Supreme Court, U.S.
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No.

In The

United States Supreme Court

PROFESSOR RAJANI KANTH
PRO SE Petitioner/Appellant

ON WRIT OF CERTIORARI TO THE US TENTH CIRCUIT COURT OF APPEALS IN HAGUE CONVENTION INTERNATIONAL CHILD ABDUCTION CASE

Vs.

CORY KANTH
Respondent / Appellee

PETITION REQUESTING WRIT OF CERTIORARI IN HAGUE CONVENTION INTERNATIONAL CHILD ABDUCTION CASE

PETITION FOR WRIT OF CERTIORARI

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207 pp

QUESTIONS PRESENTED

1. Whether the Utah District Court and the Tenth Circuit Court erroneously determined that the United States, rather than Australia, was the applicable *'Habitual Residence'* of the Petitioner's family, when they applied the Hague Convention Against International Child Abduction Law to the Facts of this Case.
2. Whether the Utah District Court and the Tenth Circuit erroneously ruled in this Case, contravening due process, without exploring the Facts through a Hearing, and without Examination of the Evidence and Briefs presented by the Petitioner, and without allowing time to Petitioner to secure proper representation by Counsel.
3. Whether the Circuit Court should have Stayed Utah State Court proceedings, during the Course of the Appeal, when requested, as required under the Hague Convention , to ensure that a final determination regarding the Return of Abducted Children under the Hague Convention was entered, prior to the Utah State Court taking up Child Custody matters with respect to the abducted children.
4. Whether the Utah Federal District Court erred, stepping outside its jurisdiction, when it consented to 'settling' a Hague Convention Child Abduction Case, in fact actually dismissing it, in favor of a Divorce and Custody Stipulation, in the absence of the Petitioner, requiring the latter to gratuitously 'win back', on a *Pro Se* basis, his Properly filed Hague Convention Case as an *entre* back into the protection of the Hague Convention.

LIST OF PARTIES:

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PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT

The Petitioner, Professor Rajani Kanth. respectfully prays to Court to Issue a Writ of Certiorari to Review and Set Aside the Judgment and Opinion(s) of the Tenth Circuit Court in Denver.

OPINIONS BELOW

The Opinion of the Utah District Court (*APPENDIX C)* is Reported at 79 F. Supp.2d 1317
The Opinions of the Tenth Circuit Court are included in *APPENDICES , A, B, D & E*

BASIS FOR JURISDICTION

Petitioner respectfully submits that this Court has jurisdiction to review this matter pursuant to U.S.C. § 1254(1).
The United States District Court for the District of Utah dismissed Petitioner's Hague Convention Case on Dec 14th. 1999. Petitioner filed a timely Appeal to the United States Court of Appeals for the Tenth Circuit, which issued a Ruling on November 2, 2000 denying Petitioner's Appeal. Petitioner's timely petition for rehearing was denied by the United States Court of Appeals for the Tenth Circuit on Nov. 22, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Articles of the Hague Convention on the Civil Aspects of International Child Abduction (*APPENDIX I)*
The International Child Abduction Remedies Act , 42 USC 11601, Section 2. (b).3.(B).(*APPENDIX J*); also Sec.2.(b).4
The Fourteenth Amendment to the US Constitution
Article III, Sections 1 and 2. of the US Constitution.

STATEMENT OF THE CASE

Facts pertaining to the Kanth Family's Normal Residence in Australia:

Petitioner, a US academic sought and found employ, as a Visiting Professor, in Sydney, Australia, moving there with his family (wife and two very young daughters) in **June of 1997.** In the course of his stay there, his contract with the University of New South Wales was renewed, but on February 19, 1998, he received a *permanent* offer of employ from the University of Technology, Sydney, which he accepted. (*APPENDIX L*). In early Spring of **98** , however, his wife, the Respondent, was assaulted in a Sydney street and, to help her recuperate, the family took a short holiday in **April 98,** visiting Respondent's family at the latter's home in Salt Lake City.

At the end of their brief and refreshing holiday, the family returned to their residency in Sydney, Australia , confident in the knowledge of the *previously accepted permanent job offer* from the University of Technology, in **June of 98,** where they remained until the Respondent, with a long history of radical substance abuse and serious psychological disabilities; suddenly departed unannounced abducting the Petitioner's minor children on **March 25th, 1999**.

Facts pertaining to the Acclimitisation of the Kanth Children in Australia:

Upon their original arrival in Sydney, Australia, in **June of 97,** on resident Visas, the Kanth girls were only 4 and 2 and had never attended school., having spent the previous academic year in Denmark where Petitioner had held a Visiting Professorship. As such, Sydney was the very first school experience for the older child, Malini, who graduated from Kindergarten, and 1st grade, in two separate Sydney public schools, being well ahead in 2nd grade ((indeed being granted 'advanced standing' and placed in an accelerated learning group) before her residence in Australia was rudely terminated. She secured numerous , indeed weekly, competitive awards at her grade school for her remarkable academic abilities.

The younger child, Anjana, barely 2 years old, was part of church based play groups close to home as more appropriate to her age. The older child, barely 4 at the time of arrival in Sydney and but 6 when abducted, was involved in a range of curricular and extra-curricular activities: she took gymnastics classes, securing a diploma; took swimming lessons, at the University pool ; took part in a program of

Dramatic Arts at the prestigious National Academy of Dramatic Arts; took part in a children's theatre group; and took separate piano and ballet lessons (the last cut short almost at inception, after her very first lesson, by the abduction).

Their family life was both pleasant and bountiful (with no record of domestic discord) as appropriate to an academic family, with frequent academic and social visitors, students, colleagues, their families and their children, at dinner parties, birthday parties, and such. The children enjoyed the beaches, the museums, the zoo, and the relaxed and recreational lifestyle of Sydney (they had a home with a pool for part of their stay there). In effect, the children had lived in Sydney, as normal and ordinary residents, from June of 1997 to March of 1999, with the older child actually proud of her ability to near perfectly mimic the Australian accent.

Legal Proceedings Under the Hague Convention:

After the sudden and surreptitious abduction, on the part of a chronically unstable Respondent , Petitioner traveled to Utah to inquire as to the rationale for the abduction and the welfare of his abducted children. It became apparent that that the Respondent was under pressure from her family to disdain the marriage owing to the latter's religious and ethnic preferences. Petitioner then returned to Australia and filed a *Petition for Return* of his Abducted Children under the *Hague Convention on International Child Abduction* (*APPENDIX H*), on the **14th of May, 1999,** [and also instituted Custody Proceedings in the Family Court of New South Wales on the 3rd of June, 1999: *See APPENDIX M*], which was duly endorsed and forwarded to the US by the Commonwealth Government of Australia. **August 27th, 1999** was the date set for a Hearing in the District Court in Utah. Petitioner arrived there on the very day of the Hearing only to discover that his attorneys had been engaged in trying, without his knowledge or acquiescence, to 'settle' the case, on the lines of divorce and custody stipulations, apparently with the approval of the District Court . Petitioner strongly resisted the unauthorised *'settlement'* , and won his Case back after a lengthy *Pro Se* legal struggle, in the same Federal Court, on **October 18th , 1999** (*APPENDIX G*).

Thereafter, Petitioner's Hague Convention Case ***(#99-CV-532-C)***, argued *Pro Se* by the Petitioner, was dismissed by the Utah District

Court on ***December 14th, 1999***, without a requested Hearing (*APPENDIX C*) , after disallowing a request by Petitioner to be granted time to retain Counsel, and after also *excluding* his principal Petitioner's Brief from due and deserving consideration , putatively on grounds of late mail delivery, as recorded and represented in the Court docket, though it had been transmitted earlier by facsimile *in all appropriate timing* (*APPENDIX K*).

The primary basis for the Dismissal was the mistaken Argument of the Utah District Court pertaining to the putative *Intent* of the Petitioner with respect to residing in Australia *permanently. Ignoring the factual evidence of their nearly 2 year residence in Australia,* and the Petitioner's *permanent employment* there, and primarily on the basis of Petitioner's applications to US universities, Court concluded that *Australia was not the family's habitual residence [a Key Hague Convention Precept].*

In effect, the critical Hague Convention concept of *Habitual Residence* , a *finding of fact* under the Convention, was being *redefined: a)* in terms of *parental intentions subsequent to the fact of moving to a new country,* and b) in terms of *permanence*, both of which are serious and major errors of interpretation of Hague Convention protocols and Case Law (stated briefy: the Convention takes the *point of the view of the child, not the parent, and looks backwards , not forwards, in time).*

Petitioner next filed an Appeal to the Tenth Circuit Court in Denver ***(Case#99-4246)*** which handed down its judgment on ***November 2 , 2000*** (*APPENDIX A)* upholding the Judgment of the Utah Court, again denying a request for Oral Argument, and also Excluding Petitioner' s previously excluded Brief yet again from due consideration (this ruling was upheld again in the Circuit Court's denial of Petitioner's Request for an *En Banc Rehearing* on ***Nov 22, 2000****; APPENDIX B)* . In effect, Petitioner's case had been adjudicated *twice,* but each time with both his Petition and his right to a Hearing, (apart from the previously denied Right to Counsel) summarily denied.

Yet again, the primary legal argument of the Tenth Circuit , echoing the District Court, referred to *the absence of a 'permanent intent' to settle in Australia,* as putatively inferred by Court principally from Petitioner's post-Relocation correspondence with US universities. Parenthetically, it is necessary to point out that the local family Courts in Utah proceeded vigorously, all through the Hague process, on

custodial . visitation, and support matters, awarding Respondent almost her demands, granting her temporary custody (*see APPENDIX F*), and assessing all manner of sanctions against the Petitioner including an effective denial of visitation rights with the abductees , *even whilst Convention proceedings were still pending in Federal Courts* , against the specific prohibitions of the Hague Convention Articles (*APPENDIX I: See Article 16),* much as their enabling counterpart legislation in the US, the *ICARA (International Child Abduction Remedies Act: APPENDIX J*). The Tenth Circuit refused to Stay local proceedings in Utah, whilst the Appeal was pending, and also refused to grant a Hearing, despite Requests by the Petitioner *(APPENDICES D and E)*. In consequence, the carefully planned *Forum-shopping*, against which the Hague Convention was primarily instituted, had paid off, from the abducting Respondent's point of view, as obviously expected, handsomely.

THE ARGUMENT

Preamble: Hague Convention Judgments of the District and Circuit Courts

Petitioner's Case, under the applicable protocols of the *Hague Convention on International Child Abduction* , originally supported and brought forward to the US by the Commonwealth of Australia (*APPENDIX H*) , was dismissed by the Utah District Court on December 14, 1999 *(APPENDIX C*), and denied on Appeal by the Tenth Circuit Court of Appeals on Nov.02, 2000 (*APPENDIX A)* in Denver, which denied again , on Nov.22, 2000, a requested *En Banc Panel Rehearing* Petition (*APPENDIX B*). The *Rationale for this Request for a Review*, simple and ineluctable as they are solemn and significant, are clarified succinctly below.

A. GENERAL SIGNIFICANCE AND IMPORT OF ERRONEOUS RULINGS:

This Case concerns a ***Hague Convention International Child Abduction Case Appeal*** involving Critical Issues of proper interpretation, adjudication , and implementation of the ***Convention Articles*** (*APPENDICES I & J)* , carrying enormous import not just for the individual Petitioner but for *the cause of abandoned parents across the globe seeking relief through the only truly international*

means available - ***The Hague Convention*** - for the ultimate crime of impassioned thoughtlessness and cruelty : *the abduction of minor children,* in order to play the adult game of successful ***forum-shopping.*** Errors of judgment and mistaken inferences here carry the potential for becoming the intolerable *precedent setting windows of opportunity* for would be abductors forevermore frustrating the high intent, and noble resolve, of the Convention.
It is the only International Covenant of its kind the world has, arrived at after years of deliberation by distinguished jurists and policy makers from the world over, and its high intent and purpose cannot be thwarted , *procedurally and substantively,* as it has been in this Case, without courting *reciprocal disaster internationally;*

Stated simply, the Circuit Court Judgment, has, howsoever unwittingly, *effectively Rewritten the Hague Convention,* eroding its Intent, and undermining its accumulated Case Law Judgments, to forever favor the Child Abductor, threatening to permanently frustrate, thereby, a vital instrument of International Public Policy in the highly sensitive and significant area of *Child Abduction,* both in the US and across the world.
It would seem apparent , to this Petitioner, that, when Lower Courts elide the objective intent of international protocols, as duly ratified by the Congress of the United States, *and inappropriately legislate new meanings to accepted terms,* posing a risk to the effective implementation of public policy, the Supreme Court, in the interest of safeguarding *uniformity and reciprocity,* the fundamental axioms of international law, has to serve as *the Constitutionally prescribed Court of Last Correction.*

B. THE PROCEDURAL DEFAULT:
While the uninformed and *voluntarist* nature of the Circuit Court Judgment is the key issue in this Petition, equally significant and compelling, from a *Public Policy standpoint,* is the nature of the *integrity of the Hague Process* - honored essentially in the breach - visited upon this Petitioner: stated plainly, it was invidious and anomalous with unwarranted disabilities imposed upon *him* , the *petitioner* in a Hague Convention action (*i.e.*, the *victimised* Party to a Hague Convention litigation), from a Denial of Right to Counsel, to a Denial of an Oral Hearing, and to an explicit refusal to even Read,

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let alone evaluate and adjudicate, the very Brief and Documentary Evidence undergirding the principal Petition under adjudication. His personally *Re*scribed and *Re*formulated *PRIMARY HAGUE BRIEF* (*included as APPENDIX K),* and its Supportive Documentation, much as his Appellant Briefs were, by explicit admission of Court, never read (let alone evaluated, or even adjudicated) - only summarily, and wholly improperly, denied and dismissed, not once but twice. The Errors, both Procedural and Substantive, violating both Hague Protocols and the common constitutional safeguards of elementary due process, were, stated simply, legion. In effect, the Courts rendered a strikingly *Ex Parte* Judgment based solely on evidence proffered by the *Respondent* , no less, in a *Hague Convention Child Abduction Case*..

The Convention Articles , as comprehensively explained in the authoritative ***Elisa Perez-Vera Report***, key document of the Convention, demand *a substantive review, not legalistic finessing* , of a Hague Petition, with the benefit of doubt accruing to the Petitioner, and with the burden of defense *against* an Order Returning the Children necessarily, and *asymmetrically*, falling on the abducting Respondent; *the actual process in this Case, however, reversed that important emphasis decisively.*

Additionally, there can be no precedent, in the US, for a Federal Judge, within a Federal Court, to *de facto* preside over a 'divorce and custody' settlement (as proposed by renegade counsels in the absence of this Petitioner) as prelude to a *de jure* dismissal of a Hague Case, *in context of an on-going Hague Convention Case Child Abduction Case* (contrary to ***42 USC 11601. Sec 2. b.4***), and yet this is exactly what the Utah District Court did, until this Petitioner relinquished his Counsels, and won his Hague rights back , *by Refiling the Case and prevailing solely on the merits of his own Brief and Argument (SEE APPENDIX G)* . And yet this should never have happened in the first place. In effect, Petitioner had been burdened, at the very outset, with a *gratuitous legal battle* simply to secure his Hague Convention rights. Furthermore, a Federal judge, in clear, and self- acknowledged, unfamiliarity with Hague Convention Protocols, nonetheless sat in Final Judgment on this Petitioner's Hague Case; in process, a *Pro Se* Hague Petitioner was severely burdened (forced to personally travel and depose, at his own expense, in Utah, though he was resident elsewhere*); his Motions left unread, or summarily dismissed; and his Case ignored, and rejected, in toto* . And the Circuit Court Panel, far

from comprehensively reviewing the Petitioner's Case for Appeal, on its factual and legal merits , simply echoed the District Court's Errors and Omissions of procedure and judgment almost *tout a fait.*
The Tenth Circuit refused to Stay local proceedings in Utah whilst the Appeal was *sub-judice*, contrary to ***Article 16*** of the Convention, thereby placing the Petitioner in *double jeopardy* as the local Courts moved swiftly to grant the Abductor- Respondent *temporary custody* , assessing all manner of damages against this Hague Convention Child Abduction Petitioner, and blocking his rights of access to his own abducted children
Both the District Court and the Circuit Court , thereby, disregarded the Petitioner's Constitutionally guaranteed Due Process Rights *(*as laid out in the *Fourteenth Amendment to the US Constitution*), and applicable Hague Convention Guidelines, as they pertained to the Adjudication Process in a Case properly brought forward under the protection of both US and International Covenants.
The Courts are the traditionally jealous Custodians of such *Rights to Process* , as the grand history of US judicial policy amply reveals; it were a shame to traduce that honorable tradition by allowing to let stand, without proper review, *an ill-considered Judgment that capped a similarly ill-endowed legal process* that altogether *Excluded* this Petitioner, a US citizen, albeit a *Resident of Australia* at the time of the Wrongful Removal of his children, effectively from ALL the means of defending his own Case involving the vital interests of his abducted and abused minor children.
Matters are placed in clear perspective *if the shoe were to be on the other foot; i.e. if a hypothetical Foreign Court were to treat a US Petitioner similarly, in reciprocating unfairness and iniquity, by a refusal to honor the Hague Treaty protocols, and, in sum, refusing to Return children abducted from the US.*, as is quite conceivable now, after the Tenth Circuit judgment. An International Treaty, to state the moral, is only as good as the Standards of Compliance set by the Signatory Nations.

C. THE SUBSTANTIVE DEFAULT:

The Substantive Basis of the Circuit Judgment , echoing as it does the District Court Ruling, is not only mistaken in its own understanding of key Hague Convention terms , *in Three Critical and Vital Regards*, but also flies in the face of the burden of received US, and Convention related, judicial wisdom as embodied in benchmark Circuit

Circuit Judgments and Expert Legal Opinion, that have thus far governed applications within this area of Law.

I. *Habitual Residence and Post-Factum 'Intentions':*

In the ***First Instance***, the Tenth Circuit, following the District Court (indeed almost the entire text of the Judgment of the District Court is run through with this sole, if mistaken, prepossession of examining the *'Intent'* of the Petitioner *after* taking up his new residence in Australia), defines the key Hague Concept of '*Habitual Residence*' (*a finding of fact*, under the Convention) in terms of the *Post-Factum Intentionality* of one parent *after* taking up a new residence (i.e. with respect to parental intent *vis a vis* the **Future**, *after the fact* of a consummated move to a new location) in a new environs , rather than looking at the *child's lived experience*, i.e. the immediate **Past** , in the new location, along with the nature of the *A Priori Intent* of the parent *prior to the original move* to the new location.

Once located in a new environs , it is simply incontestable ***that it is from the Child's perspective*** that a Hague Case is argued. The District Court emphatically did the opposite, and was , astonishingly, upheld by the Circuit Court: indeed, this reference on ***p. 6*** of the District Court Judgment, ***para#026***, leaves no room for doubt on this matter:

> *..as far as Anjana could be seen as settled in Australia.....*the focus must be dictated by ***the perspective of her parents*** (emphasis supplied by the Petitioner).

The Circuit Court echoes this error when it boldly states , on ***para#3***, ***p. 2*** of its Judgment, that:

> *...**the conduct, intentions and agreements of the parents during the time preceding the abduction** are important factors to be considered* (emphasis supplied by Petitioner).

In so scaling in, and placing reliance on, wholly irrelevant *Parental Post-Factum motivations*, after the fact of the move to a new environs, as opposed to the *physical , and cultural, lived experience* of the children in their new habitat, and the *A Priori Intent* of the Kanths in moving to Australia (which remains totally ignored in the judgments), the judgments referred to are profoundly *out of accord* with the burden of US, and International, Hague Judgments and Case Law in this Area,

and the primary thrust of the Articles and Documents of the Hague Convention. The Judgment of the Tenth Circuit Court clashes with the explicit ruling in the Landmark Opinion of ***FRIEDRICH II*** *(78F. 3d 1060, 1068, 1996)*, perhaps the most cited of all Hague Cases, *which summarily rejects this parental emphasis:*

> *To determine habitual residence the* ***court must focus on the child, not the Parents and examine past experience, not future intentions.*** (emphasis supplied by the Petitioner)

This is correctly echoed by the ***Third Circuit,*** in the other *Benchmark* Hague Convention Case of ***FEDER*** *(63, F.3d at 224, 1995).* To Cite:

> *That Mrs. Feder did not intend to remain in Australia permanently...does not void the couple's settled purpose to live as a family in the place where Mr. Feder had found work.*

The Judgment in ***MOZES vs MOZES I*** *(DC California 1998, 19 F. Suppl. 2d.1108)* underscores and repeats the same point with respect not just to the ruling in ***FEDER*** *(op. cit)*, *but also the equally categorical Judgment of the* ***Sixth Circuit*** in ***FRIEDRICH II*** *(op.cit)*, and *the near canonical Judgment in* ***BATES*** *(UK:CA, 122/89, 1989):*

> *The Third Circuit in* ***Feder*** *"guided by the aims and spirit of the Convention and assisted by the tenets enunciated in* ***Friedrich vs Friedrich*** *and* ***Bates*** *"held that a child's habitual residence is the place where she has been physically present for an amount of time sufficient for acclimitization and which has a degree of "settled purpose"* ***from the child's perspective"*** (emphasis supplied by the Petitioner).

Indeed, ***FRIEDRICH II*** *(op. cit)* had, a long time ago, defined the matter *dispositively:*

> *Any future plans that Mr. Friedrich had for Thomas...are irrelevant to our inquiry...****habitual residence can be altered only by a change in geography and the passage of time, not by changes in parental affection and responsibility*** (emphasis supplied by Petitioner)

Similar is the *affirmative confirmation* of the principle at issue, as given in many other cases *that rely on this mainstream consensus*

such as, e.g., ***SHALIT vs SHALIT*** *(D.Alaska, 1998 Case# A98-328 CV (JWS), para. 010)* which approvingly cites the judgment of ***TOREN vs TOREN*** (F.Suppl. 2d. 1998 WL 756366) thus:

> *It does not matter that the US was not intended to be the children's permanent residence, nor that it was intended when they came here that they were to return to Israel in 2000. What may happen in* ***the future has little, if any,*** *relevance to whether the children have become so "settled" in their place of residence that it may fairly be described in the present,* ***but by reference to the past,*** *as their "habitual' residence.* ***The Court must look back in time, not forward*** (emphasis supplied by the Petitioner).

Finally, in ***BENSON vs BENSON,*** *(Skane County Admn. Court, Sweden, Section 114, No. 9748-98, 1998, para. 024-25)* the judgment reads:

> *..too rigorous demands cannot be made concerning the person's intentions for the future...thus it* ***need not be a permanent residency*** (emphasis supplied by Petitioner)

Other Cases that endorse and uphold *this received norm of interpretation*, and give vital and stadial support to the Case of the Petitioner, include ***TOREN vs TOREN*** *(op. cit)*, ***MOZES vs MOZES I*** (*op. cit*) and ***WALTON vs WALTON*** *(S. D. Mass. 1996, 925 F. Suppl. 453).* The principle is also found strongly affirmed in ***Expert Legal Opinion*** as well, as in the words of ***Katherine Hung***, in Article titled ***There is no Place like Home: Determining Habitual Residence: Feder vs. Evan Feder, 26, Georgia Journal of International and Comparative Law, 487, 1997 :***

> *Evidence that one would prefer to live elsewhere does not clearly demonstrate a lack of voluntariness* (emphasis supplied by Petitioner)

Suffice to say, *post-factum parental changes of heart* have no critical bearing on Habitual Residence as much as the empirical *facts of the childrens' residence* in a new environs. In effect, the Kanths had traveled to Australia twice, once on a *temporary* contract, the second

time on a *permanent* contract , thereby fulfilling the rational essence of the notion of *intentionality*, as it bears on the criteria of Habitual Residence.

II. *Habitual Residence and 'Permanent Residence':*

In the ***Second Instance***, as made clear in ***Footnote#2*** , on ***Page#7***, of the Utah District Court Judgment, endorsed by the Tenth Circuit , *Habitual Residence is erroneously confused with 'permanent residence'*.. To cite the Utah Court:

> *The evidence before the Court, as discussed below, leads the Court to the conclusion that Mrs. Kanth is correct when she states in her affidavit that neither she nor Mr. Kanth intended* ***to permanently settle in Australia*** (emphasis supplied by Petitioner*).*

This defies the clear conviction of definitive Hague Judgments , such as ***BATES*** (*op. cit.*), the Landmark Case that stands on par with ***FRIEDRICH II and FEDER*** in its authority, where the judgment cites the classic Opinion in ***R. vs BARNET*** *(London Borough Council: Ex Parte Nilish Shah, 1983 2 A.C. 309 at 314)* approvingly:

> *...(it is not necessary that) the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period.* (emphasis supplied by Petitioner)

This view is also confirmed in the other representative Case *of* ***R vs BARNET*** *(op.cit. at 343) :*

> *I unhesitatingly subscribe to the view that "ordinary resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purpose as part of the regular order of his life for the time being, whether of short or long duration.*

Categorical reaffirmation of this *definitive Hague articulation* is also available in ***BENNETT vs. S. AUSTRALIA*** *(No. AD 1168 of 1993)* where Judge Forbes puts it *in the Australian context* where Petitioner's Case originated:

> *And it is worth mentioning, I think, that for the purposes of the [Australian] Family Law Act 1975 (section 4)* ***"ordinarily resident" is defined as including "habitually resident"*** (emphasis supplied by Petitioner)

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To underline the point yet again, as in ***BENSON vs BENSON*** (*op. cit.*):

> (Habitual Residence*) need not be a permanent residency*
> (emphasis supplied by Petitioner).

This is found to be amply and unmistakably reconfirmed in key *Authoritative* Convention Documents such as the ***Elisa Perez-Vera Report*** *(op. cit)*, and widely referenced literature on the subject such as ***Dr. Eric Clive's , The Concept of Habitual Residence*** *(in The Judicial Review, Part 3, 1997).*
As such, *Habitual residence is simply Ordinary Residence,* as explicitly defined in ***R vs BARNET*** *(op. cit).* On the other hand, the cognate Factor of *adequate Temporality*, given the important attribute of '*Settled Intent*' [established unequivocally in the Case of the Petitioner by the Permanent Job Offer – *APPENDIX L*– from Sydney, accepted by him] , ranges variably, in Hague Case Law interpretations, from periods of but just ***One Day to Six Months*** (with the latter being accepted now as the *definitive threshold period of time*) , as illustrated in the chorus of Opinions rendered in ***ZENEL vs HADOW*** *(1993, SLT, 975)* ***BROOKE vs WILLIS*** *(S.D.N.Y. 1995, 907.F. Suppl.57),* ***and BENNET vs S. AUSTRALIA*** *(op. cit)), C vs S (A Minor, 1990 2 FLR 442) , et. al.*
In sum, the Kanths were under no Hague Convention statutory obligation to intend to live in Australia *permanently*; nonetheless, they had traveled to Australia not once but *twice*, and the second time – being a *Return* to their *Habitual Residence* , rather than a 'second visit', since all their personal furnishings had been left behind in Sydney - armed with a permanent contract. No discussion of their subjective, *subsequent intent* can gainsay the objective nature of the permanent contract that attracted them , voluntarily and freely, back to their continuing Australian residency.

III. HABITUAL RESIDENCE AND TEMPORALITY

Furthermore, ***as a Third Issue,*** of a *factual* nature (with which the notion of *habitual residency* is more concerned, *after* a relocation), the Courts, quite remarkably, ignored the empirically operative fact that there were *Two family visits* to Australia, the second **return** visit made on the firm basis of a permanent job offer, concentrating their attention, in effect, entirely on the *first visit* (which, while still entirely sufficient in its *'Settled Intent'* rationale from a Hague

perspective, was nonetheless made even *stronger* by the indisputable *intentionality* involved in the family's second return to, and sojourn in, Australia). The ***factual importance*** of the family's *Second Return visit* to Australia in ***June, 98***, having had several weeks of family vacation time to ponder their continued resolve to return, cannot be understated:. A family that went there not once, but Twice, returning in the second instance armed with a permanent job offer, *can hardly be seen as lacking purpose, determination, or, 'settled intentionality'*. Furthermore, and even more importantly, the Courts also ignored the *single most important* ***empirical parameter*** pertaining to the Kanth family's habitual residency in Australia : *i.e. their prolonged sojourn in Australia across three Calendar years* that would have overwhelmingly supported the Petitioner's Case, and instead focused on the *first* , and only one, of the *two* visits suggesting thereby a misleading penumbra of indecision and uncertainty. In fact, so much stress is placed on *post-factum intentions* that the factual, empirical issues of the family's and the childrens' *actual, settled , physical and cultural* residence in Australia, with which the Convention notion of *'habitual residence'* is properly concerned, are given but short shrift. Stated importantly, the key statutory requirements of the Hague notion of *habitual residence* of the Kanth family (free and voluntary *Residents of Australia from June 1997 through March 1999* , barring a brief vacation in between , when the Abduction abruptly cut short the sojourn of the children) are satisfied as much by their prolonged *Temporal Situation*, in Australia as by their demonstrated (*a priori*) *'Settled Intent'*, quite overabundantly . Given the Petitioner's employment, the family's length of stay , and the range of curricular and extra-curricular involvements of the older child, they were emphatically *Ordinarily, and hence Habitually, Resident in Australia* beyond the shadow of a doubt (somewhat more information on these Hague Issues is provided in *APPENDIX K*, op. cit).

Both the Federal Courts discounted these impeccable Hague Rationale vis a vis *habitual residence - a combination of a reasonable indication of settled (but a priori) parental intent and a threshold of temporality allowing for acclimitisation of children* - in favor of taking a wholly unprecedented stance of basing Habitual Residence on the *putative Intent* of the Petitioner (and demanding an intent of *permanency* of residence from it) , as supposedly *'revealed'*, moreover, in his applications to universities elsewhere, but well ***after*** his move to Australia, all the while ignoring important factual,

empirical details of the Kanth children's actual sojourn in Australia. *In this, they are making invidious and illegitimate legal history.* The US Courts need to ponder whether they now wish, thereby, to Rewrite , and Reinvent, the Hague Convention , but in the novel and unintended direction of eroding its Principal Intent - the Mandated Judicial Duty , of Signatory States, to Return Abducted Children (Article 12 of the Convention), given the novel exit to abductors offered by the redefinition, should they let this unprecedented restatement stand unchecked and uncorrected.

REASONS FOR GRANTING THE PETITION

It is apparent that the Judgments of the Utah Court and the Circuit Court may both be hoisted on the same petard: they were both seriously misconceived, based as they were on a plainly erroneous understanding of the Key Hague Convention concept of *Habitual Residence* as it pertains to: a) the Role, Place, and Significance of *Post-Relocational Parental Intentions* in a Hague Convention Case , b) the critical importance of the *empirical and cultural facts of residence* and acclimitisation on the part of the children, and, c) the issue of *'permanency'* of residence

The judgments go erratically against the grain of widely respected and universally cited US Circuit Court Rulings that have taken on, by now, a near canonical authority in the US, and abroad, within Convention Case Law. Aside from misinterpreting Hague Convention protocols, the Tenth Circuit unwittingly usurps a legislative function that is not its prerogative by inadvertently redefining the meaning of vital, and well-ordained terms such as *'Habitual Residence*" and *'Settled Intent*", and in a direction arguably antithetical to Convention intent.

This unilateral, precedent-setting , rewriting carries the very real and serious potential of making it easier for potential abductors to bypass the Convention, thereby entailing the risk of permanently nullifying the explicit aim of the Hague Convention by providing a significant legal bypass to would-be abductors in terms of a novel *' change of heart'* pleading that would now be canonized , by this Case, as a permanent escapé clause from the explicit judicial mandate to return abducted children which is the cornerstone of the Convention.

An International Treaty can only survive on the basis of uniformity of application. If each Circuit Court in the US were to impart its own definition to the Convention, as is apparently now becoming the trend [as reflected in the recent ruling in ***Mozes II*** - *F.3d.D.C. 9th Circuit, 2001. CV-98-56505* - that , unlike ***Mozes I*** *(op. cit)*. tries to depart from mainstream renditions of Habitual Residence and Settled Intent]. in the direction of deviating from, and relaxing the import of. the essential aim of the Convention , the 'restoration of the pre-abduction status quo' (as quoted in ***FRIEDRICH II,*** *op. cit)* , *it were only a matter of time when the Convention would no longer be applicable in the US.*

As such, the Tenth Circuit ruling is an *invitation to anarchy* in this field of law, inviting, in time, predictably *reciprocal* responses from the other Signatory nations of the rest of the world. with the unfortunate casualties being both the Convention itself , and the scores of victimised minor children forced into international play , annually, as hapless pawns by calculating and unscrupulous parents.

The economic and social trends of Globalisation extant today make for fluid transience in the residency of qualified individuals responding increasingly, and in larger numbers, to opportunity and need in international markets the world over; but these latter-day realities of a mobile society must not be allowed to abrogate , willy-nilly, the inviolate *rights to stability* of minor children innocently caught in the altered intent of a dissatisfied parent , as was clearly intended by the framers of the Hague Convention. Stated succinctly, discord in a marriage, after the fact of an agreed-upon relocation, should not be reason enough for a spouse to *forum-shop* his/her way back to a more hospitable jurisdiction hauling minor children, as either chattel or as bargaining chips.

In this respect, the Supreme Court could provide a valuable assist to public policy, in the US and abroad, if it were to provide a *uniform standard of evaluation* , but one that is respectful of Convention Intentions (involving a subtle combination of a definable *a priori* parental Intent and a threshold of *acclimitisation* time for the children, as described earlier) for the key Convention notion of *"habitual residence"*, that may then serve as a safeguard against both willful and inadvertent misinterpretation and redefinition.

That much is actually *indicated by the ICARA,(**42 USC 1601, Sec 2. b. 3. B***), when it calls explicitly for a "uniform international interpretation of the Convention". *Prima facie*, there is sufficient

warrant to believe that the mainstream standards in this regard (as already cited in this Petition), from which the Tenth Circuit judgment deviates drastically, are entirely adequate, appropriate, and consistent with Convention guidelines. As such, Court could do little better than emphatically uphold, reinforce, and standardize those very standards. At another remove, serious violations of the most elementary judicial procedural *ethics*, as they pertain to the domain of *due process rights in litigation*, protected in general by the US Constitution ,and protected specifically also by the ICARA (*42 USC 11601.et.seq)* within a Hague context, are also at issue here given that Petitioner's Brief was excluded on (specious) technical grounds, a requested Hearing was disallowed, and a request for time to find Counsel was denied. As such, it is Petitioner's contention that his Case was never really adjudicated, only dismissed; and, more so, dismissed in favor of a child abductor, and in conflict with the burden of Hague Case Law. Even where misinterpretation may not be the issue, there is enough gray area in the Application of the Hague Convention, particularly in the federalist US, with its parallel and competing jurisdictions, to invite confusion even on the part of the most sagacious judicial authorities. It is unclear, for instance, exactly *when* a Hague Petitioner's legal recourse, under the Convention, ceases to apply such that local courts can go forward with their business determining custodial issues. The Tenth Circuit refused to Stay local proceedings, when requested, presumably on the presumption that the District Court dismissal of the Petition terminated the operation of **Article 16** of the Convention. It is Petitioner's conviction , on the other hand, *that unless all legal recourse is exhausted, including the Appellate process in full (subsuming also petitions to the Supreme Court) , the Convention continues to apply*, which would seem to fit the Convention intent better of securing *maximum substantive justice* for the left-behind spouse, who is at a radical disadvantage given the *'home court advantage'* of the Abductor-Respondent in a Hague Case. Again, the Supreme Court can lend a hand at clarification of such issues so that Hague Petitioners, victims already to begin with, may not be victimized yet again by jurisdictional confusion , competition, and conflict.

The *UCCJA* (*Uniform Child Custody Jurisdiction Act)* is a domestic attempt to establish uniform standards in the area of child custody, precisely because of wide variance in the practices of individual States; the Hague Convention on International Child Abduction is a

parallel attempt to legislate similarly enforceable and uniform guidelines for the world at large in the field of Child Abduction.. But the latter intent can hardly be realized, if, even within the limited sphere of just one sovereign nation, multiple and competing definitions, and diverging approaches to key parameters, are permitted to coexist uneasily , as is now the case with each Circuit Court defining Habitual Residence unilaterally, and according to its own lights.

CONCLUSION

In sum , it is Petitioner's contention that his Case was, thereby, as Wrongfully Adjudged as his own Briefs, Documents, and Participation, were Wrongfully Excluded. *En passant*, the heinous offense of international abduction of minor children, recognized now as the *newest form of Child Abuse* in the Global arena , was, in effect, condoned by the Tenth Circuit contrary to the explicit *raison d'etre* of the Hague Convention, and the legacy of landmark US Circuit Court judgments within it.

As such, Petitioner prays for an immediate and effective Redress of these Wrongs. This will not merely right his own personal wrongs, *but also restore the integrity of the Convention* (placed at risk by the Tenth Circuit Decision) and fulfil, as intended, the Treaty Obligations of the United States under the relevant Covenants of an important Agreement in International Law.

It is this Petitioner's contention that only the Supreme Court , unlike Lower Courts usually occupied with more parochial, domestic matters, may be expected to have both the Constitutional Stature, and the larger Judicial Interest , Responsibility, and Vision, as the highest Court in the land, to pay serious heed to the critical issue, fraught with enormous implications, of the *importance of US Compliance* , within a uniformly established and enforced framework of Reciprocity, with International Laws and Treaties , much as the basic Civic Rights issues of protection of due process guarantees to private citizens forced into litigation, as raised in this Case.

Given the foregoing, Petitioner, pleads for all due, and requisite, Relief.

Respectfully,

Professor Rajani Kanth **Singapore, February 19, 2001**
Pro Se Hague Convention Petitioner

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APPENDIX 'A'

Tenth Circuit Denial of Petitioner's Hague Appeal

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT
Tenth- Circuit

RAJANI K. KANTH, Petitioner-Appellant, Clerk v. COREY LEIGH KANTH, Respondent-Appellee.	(D.C. No. 99-CV-532-C) (D. Utah) 79 F. Supp. 2d 1317

ORDER AND JUDGMENT(*)

Before **BALDOCK, KELLY, and HENRY,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

This appeal is taken from an order of the district court denying petitioner's petition under the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (ICARA), and the Hague Convention on the Civil Aspects of International Child Abduction. The underlying facts are adequately outlined in the district court's decision. See Kanth v. Kanth, 79 F. Supp. 2d 1317 (D. Utah 1999).

The purpose of the Hague Convention is to secure the prompt return of children who have been wrongfully removed or retained in order that the court of the country in which the children habitually reside can make a custody determination. See id. at 1321. The petitioner is obligated to show, by a preponderance of the evidence, that the retention or removal is wrongful. See Shalit v. Coppe 182 F.3d 1124, 1128 (9th Cir. 1999) (citing 42 U.S.C. § 11603(e)(1)); In re Prevot, 59 F.3d 556, 560 (6th Cir. 1995) (same). A removal or retention is wrongful if it breaches a person's custody rights under the law of the state in which the child was habitually resident immediately prior to the removal or retention and at the time of the removal or retention those rights were actually exercised. See Lops v. Lops, 140 F.3d 927, 935 (11th Cir. 1998) (citing Article 3 of Hague Convention); Ohlander v. Larson, 114 F.3d 1531, 1534 (10th Cir. 1997) (same). The term "habitual residence" is not defined by either the Hague Convention, see Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995), or the ICARA. See Prevot, 59 F.3d at 560. Rather a child's habitual residence is defined by examining specific facts and circumstances and is a term courts should not interpret technically or restrictively. See Zuker v. Andrews, 2 F. Supp. 2d 134, 136-37 (D. Mass. 1998), aff'd, 181 F.3d 81 (1st Cir- 1999) (table); see also Harkness v. Harkness, 577 N.W. 2d 116; 121 (Mich. Ct. App. 1998) ("determination of habitual residence' depends largely on the facts of the particular case"). Although it is the child's habitual residence that the court must determine, in the case of a young child(1) the conduct, intentions, and agreements of the parents during the time preceding the abduction are important factors to be considered. See Feder v. Evans-Feder, 63 F.3d 217, 223 (3d Cir. 1995); see also Pesin v. Osorio Rodriguez, 77 F. Supp. 2d 1277, 1285 (S-D. Fla. 1999) (court would focus on parents' actions and shared intentions where children were four and six at time of alleged wrongful retention). In addition

[T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

Feder, 63 F.3d at 223 (quotation omitted).

The district court used these definitions along with an analysis of the children's circumstances and the parents' shared intentions regarding their children's presence in Australia in determining that their habitual residence before being taken to the United States in 1999 was not Australia. The district court's factual finding that Australia was not the habitual residence of the children is not clearly erroneous. See Harkness, 577 N.W. 2d at 124. Therefore the legal conclusion that their removal to Utah was not wrongful necessarily follows. See Osono Rodriguez, 77 F. Supp. 2d at 1286 (on finding that parents lacked shared intent that children stay in Florida, court concluded that Venezuela was habitual residence immediately before date that family had intended to depart Florida); Levesque v. Levesque, 816 F. Supp. 662, 665 (D. Kan. 1993) ("Removal or retention of a child can be wrongful only if the removal or retention is from the habitual residence of the child."); Meredith v. Meredith, 759 F. Supp. 1432, 1434-35 (D. Ariz. 1991) (same).

Our review of the record persuades us that the district court's determination was correct. Insofar as petitioner's

supplementary documentation in support of his opening brief was not before the district court, we have not considered it. Respondent's motion to file appellee's appendix is GRANTED. Any other outstanding motions are DENIED. Accordingly, for substantially the reasons stated in Kanth, 79 F. Supp. 2d 13 17, the judgment of the Unites States District Court for the District of Utah is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Paul J. Kelly, Jr.

Circuit Judge

FOOTNOTES

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th CIT. R. 36.3.

1. At the time the Kanth children were removed from Australia by their mother and taken back to Utah, they were six and three years old.

APPENDIX 'B'

Tenth Circuit Denial of Petitioner's Plea For an 'En Banc' Rehearing

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAJANI K. KANTH, Petitioner - Appellant, v. COREY LEIGH KANTH, Respondent - Appellee.	**No. 99-4246**

ORDER
Filed November 22, 2000

Before **BALDOCK**, **KELLY**, and **HENRY** Circuit Judges.

Rojani Kanth's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: Deputy Clerk

APPENDIX 'C'

Utah District Court Dismissal of Petitioner's Hague Petition

IN THE UNITED STATES
COURT FOR THE DISTRICT
OF
CENTRAL DIVISION

FILED
14 DEC 99 PM 2:02
DISTRICT OF UTAH
BY:

RAJANI K. KANTH, Plaintiff; ORDER vs. CORY LEIGH KANTH, Defendant.	Case No. 2:99CV532C

Mr. Kanth has filed this petition under the International Child Abduction Remedies Act, 42 U. S. C. § 11601-11610 ("ICARA"), and the Convention on the Civil Aspects of International Child Abduction, included in the Hague Convention adopted on October 25, 1980 ("the Hague Convention"). Mr. Kanth alleges that Mrs. Kanth wrongfully removed the children from Australia to the United States, and

that, under the Hague Convention, the children must be returned to Australia so that the courts of that country can determine custody. For the reasons stated below, Mr. Kanth's petition is denied.[1]

Background

Mr. and Mrs. Kanth and their two daughters are citizens of the United States. Mr. Kanth was born in India, but moved to the United States. He became a naturalized United States citizen in 1985. Mr. and Mrs. Kanth were married in Salt Lake City, Utah, in March 1990. Both of the Kanth daughters were born in

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[1]This matter was set for oral argument on December 9, 1999. However, Mr. Kanth, who now lives in New York, requested that oral argument be continued. Because the progress of this case has been slow, the court was reluctant to grant such a continuance. Mr. Kanth agreed that the court could resolve the matter on the basis of the written material, without oral argument. The court has now carefully considered the materials of the parties (those that were filed within the deadlines set by the court) and concludes that. oral argument would not assist the co in reaching a decision.

Salt Lake City: Malini Amstel Kanth in 1993 and Anjana Kesari Kanth in 1996.

Mr. Kanth is a college professor. In 1993, the University of Utah denied Mr. Kanth tenure. Although he made application to numerous universities, he was unable to find an acceptable position in the United States. In 1996, Mr. Kanth accepted a temporary academic position with the University of Aarhus in Denmark; he left the United States in June of that year. Mrs. Kanth and the children stayed in Salt Lake City until September 1996, when they joined Mr. Kanth in Denmark.

The Kanths did not stay long in Denmark. Mrs. Kanth and the children returned to Salt Lake City in April 1997; Mr. Kanth returned in September of that year. Following their return, Malini enrolled in a preschool in Salt Lake City. According to Mrs. Kanth, Malini made friends in the preschool and generally excelled.

Because Mr. Kanth was not able to locate an acceptable academic position in the United States, he again accepted a

teaching position in a foreign country, at the University of New South Wales, Australia. Mrs. Kanth opposed the move, consenting to go only when Mr. Kanth told her that the family's stay in Australia would last only six months.[2] The Kanth family traveled to Australia on temporary visas, arriving in July 1.997. They left behind most of their household furnishings and personal belongings, including many of the children's toys. These items were stored primarily with Mrs. Kanth's family in Salt Lake City. (See Cory Leigh Kanth Aff. Exhibits) (Photographs).

The Kanth family was in Australia for a total of nine months, from July 1997 to April 1998. While in Australia, Mr. Kanth continued to seek teaching positions in the United States. When his efforts were unsuccessful, he agreed to continue in his

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[2]Mr. and Mrs. Kanth disagree sharply over whether they intended that their stay in Australia would be permanent or temporary. The evidence before the court, as discussed below, leads the court to the conclusion that Mrs. Kanth is correct when she states in her affidavit that neither she nor Mr. Kanth intended to permanently settle in Australia.

teaching position at the University of New South Wales for six months. However, Mr. Kanth did not complete this second six-month term. He and his family returned to Salt Lake City in April 1998. When the family left Australia, they broke their lease on their apartment and forfeited a $1,120 rental bond.

Although Mrs. Kanth states that the family returned to the United States because Mr. Kanth had an interview at Franklin and Marshall College in Pennsylvania, a fact the court accepts as correct, two letters submitted to the court by Mrs. Kanth indicate that the family may have also left Australia as a result of Mr. Kanth's personal difficulties. The first letter is from Dr. Graham Voss, Associate Head of the School of Economics at the University of New South Wales. In the letter, Dr. Voss acknowledged that Mr. Kanth was resigning his "visiting position" as of April 2, 1998. Dr. Voss stated: "Again, let me express my sympathies with your difficulties and wish you and your family all the best in the future." (Cory Leigh Kanth Aff. Exs. at 193) (Letter from Voss to Kanth of 3/30/1998). The second

letter was sent by a counselor (the signature is illegible) from the Solution Focused Counselling Centre. The author obviously knew of problems Mr. Kanth was facing. The letter begins: "Thanks for the post card. Obviously you made it back to Utah and memories of Australia have hopefully faded a little." (Id. at 195) (Letter of 5/11/1998). After giving Mr. Kanth encouragement and advice about his mental and emotional state ("I am impressed that you have started work on controlling your `demons' "), the author concludes with the statement: "Hope you will be smiling more now that you are back in the States. Keep in touch." (Id.)

Back in Utah, the children apparently settled into the routine and practices they had had before the move to Australia. Malina returned to the same preschool. The children renewed their ties with Mrs. Kanth's family, with whom the children were very close. (Mrs. Kanth's family were the only relatives the children knew). The children were seen by Dr. Tom Metcalf, who had been their pediatrician since their births.

(The children were seen by several different doctors for illnesses in Australia).

Mr. Kanth accepted a temporary research fellowship at Harvard University, and pursued his interview opportunity in Pennsylvania. Mr. Kanth hoped that his Harvard fellowship would help him obtain a teaching position in the United States. Roger Owen of Harvard University wrote a letter of recommendation for Mr. Kanth. In his letter, Mr. Owen noted:

> Since leaving the University of Utah Rajani has led a somewhat peripatetic existence, teaching in Denmark and Australia and working on his general critique of Enlightenment thinking. He continues to be as productive of new ideas as ever. But he certainly needs somewhere to rest awhile if he is to exploit these new veins of thought to the full.

Id. at 020) (Letter from Owen to Kanth of 5/11/1998).

When Mr. Kanth did not find a teaching position in the United States, he accepted a three year position at the University of Technology ("UTS") in Sydney, Australia, and the Kanth Family left for a second stay in Australia in July 1998. Again, most of the family's furniture and personal belongings were left behind

in Salt Lake City.

Although Mr. Kanth contends that the family intended to stay in Australia, the evidence in the record does not support his contention. Mrs. Kanth states in her affidavit that they left reluctantly for Australia, and that Mr. Kanth had assured her they would return to the United States by autumn in 1998. Mr. Kanth believed that he would soon have a job with Duke University. Mrs. Kanth's statement that her husband anticipated that he would be receiving a job offer from Duke University is corroborated by an e-mail message, sent by Mr. Kanth to Mrs. Kanth's father, telling him of the family's address in Sydney and asking him to "send us any normal mail to the new address indicated above (this is important since DUKE UNIVERSITY will be writing to me at your address) OR you can open the mail and read it to see what it says and then call us (this is better for being much FASTER.)" (Id. at 056) (e-mail from Kanth to Meyer of 7/23/1998).

When the position at Duke University did not

materialize, Mr. Kanth continued to apply for other positions in the United States. In October 1998, Mr. Kanth wrote an application letter to Florida Atlantic University in which he declared:

> I am specially happy to be applying to Florida Atlantic for a suitable position in economics. Briefly, my current status is that I am in the running for a Chair in economics here at the UTS, having just returned from a visiting stint at Harvard. However, my sights are set elsewhere: for years now, I have been seeking to return to the US for professional and personal reasons (my family lives in Utah.)

(Id. at 021) (Letter from Kanth to Florida Atlantic University of 10/10/1998).

In a letter written to Mrs. Kanth's father in May 1999, Mr. Kanth makes clear his desire to find work in the United States:

> I am trying my best, as I have had for years, to find employment back in the US: in the very short run, this may or may not happen. But the long run prospects remain very high given the level of my productivity. It may happen as early as this Fall, or maybe a bit later.

(Id. at 032) (Letter from Kanth to Meyer of 5/5/1999).

According to Mrs. Kanth, Mr. Kanth feared that the time he spent as a lecturer at UTS, a business school, and not as a

professor at a nationally-ranked university, would damage his academic reputation and his future job opportunities. In fact, Mr. Kanth was apparently so dissatisfied with his positon at UTS, that he considered accepting a job at the National University of Singapore, when an offer was extended to him in January 1999. (Id. at 027) (Letter from National University of Singapore to Kanth of 1/29/1999).

During their second stay in Australia, the Kanth family again lived in rented apartments. According to Mrs. Kanth, the family lived in a total of seven different rented lodgings during their two stays in Australia.

Mr. and Mrs. Kanth disagree about the children's adjustment to their life in Australia. According to Mr. Kanth, the children enjoyed life in Australia and had friends and playmates there. Mrs. Kanth disputes this claim and goes into considerable detail about the loneliness her children experienced during both their stays in Australia. (Cory Leigh Kanth Aff. at 25-27.) The evidence is not clear on this question.

For example, Malini was a student at the Randwick School during the family's second stay, and her December 1998 report card from the school reflected that she was "a very capable child" and did well in her studies. (Cory Leigh Kanth Aff, Exs. at 143) (Student Progress Report). However, the teacher noted that Malini was "quite timid and reserved." (Id,). On the other hand, Malini's principal at the Randwick School, Peter Kensell, stated that "Socially, Malini had a number of close friends who enjoyed her company in the classroom and the playground." (Petitioner's Mem. Supp. Petition Ex. J) (Letter from Kensell to whom it may concern of 6/23/1999). Mr. Kanth also asserts that Malini engaged in various extracurricular activities while in Australia, such as piano lessons and ballet. However, there is nothing in the record that casts doubt upon Mrs. Kanth's statements that Malini attended these activities infrequently, going to only three piano lesson and one ballet lesson. (Cory Leigh Kanth Aff. at 26.)

Mr. Kanth has submitted several letters from

professional colleagues. For the most part, none of the letters are of particular assistance to the court because of their conclusory nature, lack of detail, and statements to the effect that Mr. and Mrs. Kanth enjoyed a warm, loving relationship. Such assessments cast doubt on the accuracy of the other statements made by the authors, because there is no question that the relationship between Mr. and Mrs. Kanth was deeply troubled and worsened during their stays in Australia, and by March 1999, the relationship between Mr. and Mrs. Kanth had deteriorated to the point that Mrs. Kanth returned to Salt Lake City with the children.

Discussion

The purpose of the Hague Convention is "to secure the prompt return of children wrongfully removed or retained" so that the courts of the country where the children habitually reside may make a determination of custody. Hague Convention, Art. 1.

To obtain relief under the Hague Convention, a petitioner has the burden of proving, by a preponderance of the evidence, that the children have been wrongfully removed or retained. See 42 U.S.C. § 11603(e)(1). A removal or retention is "wrongful" if:

> (a) it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention; and
> (b) at the time of removal or retention those rights were actually exercised . . . .

Hague Convention, Art. 3.

The first question, then, is whether Australia was the habitual residence of the two Kanth daughters before Mrs. Kanth took them from Australia in March 1999. If the habitual residence of the children was not Australia, then there was no wrongful removal. See Ponath v. Ponath, 829 F. Supp. 363, 364 (D. Utah 1993) (internal citation omitted).

The term "habitual residence" is not defined in either the Hague Convention or ICARA. Courts have speculated that the

"'intent is for the concept [habitual residence] to remain fluid and fact based, without becoming rigid.'" Id. at 365 (quoting Levesque v. Levesque, 816 F. Supp. 662, 665 (D. Kan. 1993)).

The Third Circuit has discussed the concept of habitual residence in detail, noting that although it is the child's habitual residence that must be determined, in the case of a young child, "the conduct and the overtly stated intentions and agreements of the parents during the period preceding the act of abduction are bound to be important factors and it would be unrealistic to exclude them." Feder v. Evans-Feder, 63 F.3d 217, 223 (3d Cir. 1995). The court further explained:

> [T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

Id. (citation omitted). The court determined that:

> a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization which has a degree of "settled purpose" from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

Id. at 224.

When the above definitions are applied to the facts here, it is evident that the habitual residence of the Kanth daughters immediately before being taken to the United States in March 1999 was not Australia but the United States. In March 1999, Malina was almost six years old, Anjana three. They had spent nine months in Australia on their first stay, and approximately the same amount of time on their second. Although Malina had attended school in Australia, the evidence suggests that she may have had difficulty finding friends in school and felt isolated. And as far as whether Anjana could be seen as settled

in Australia, due to her young age, the focus must be dictated by the perspective of her parents.

Also significant, and evidence that the children would not have been "acclimatized" to their life in Australia and would not have felt "settled" in their Australian surroundings, is the fact that the family lived in a succession of rented dwellings. Adding to the unfamiliarity of the children's surroundings, the rented accommodations in which they were living were not furnished with the family's own belongings. The photographs submitted by Mrs. Kanth show that much of the family's furniture and personal belongings were stored while the family was in Australia. The stored belongings include such items as Malini's rocking chair, the children's chest and toy cupboard, the children's yard furniture, and Malini's bicycle and Anjana's tricycle. Such items are the kind that children rely on to give them a sense of home and belonging, and the Kanth children did not have these familiar belongings with them when they were in Australia.

The evidence is also overwhelming the children's parents believed that their two stays in Australia would be temporary, and brief. Mrs. Kanth adamantly insists that she went to Australia reluctantly, relying on her husband's assurance that the family would quickly return to the United States. And Mr. Kanth's constant search for a teaching position in the United States, as shown by the numerous letters to and from colleges and universities in the United States, as well as his own words in his letter to Mrs. Kanth's father, undermines his present assertion that it was the family's intention to remain in Australia.

In sum, Mr. Kanth has failed to show that Australia was the habitual residence of the children and, accordingly, his petition is DENIED.

SO ORDERED this 14 day of December, 1999.

BY THE COURT: Tena Campbell

TENA CAMPBELL
United States District Judge

ce

United States District Court for the

District of Utah
December 14, 1999

** MAILING CERTIFICATE OF CLERK **

Re: 2:99 -cv-00532

True and correct copies of the attached were mailed by the clerk to the following:

Rajani K. Kanth
WAGNER COLLEGE
SOCIAL SCIENCES
ONE CAMPUS DR
STATEN ISLAND, NY 10301
(718) 390-3100

Frederick N. Green, Esq.
GREEN & BERRY
10 EXCHANGE PLACE STE 622
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JFAX 9,3635658

Mr. Harold G. Christensen, Esq.
SNOW CHRISTENSEN & MARTINEAU
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SALT LAKE CITY, UT 84145-5000
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APPENDIX 'D'

Tenth Circuit Denial of a Request to Stay Local Utah Custody Proceedings

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAJANI K. KANTH, Petitioner-Appellant, v. COREY LEIGH KANTH, Respondent-Appellee,	No. 99-4246

ORDER
Filed January 19, 2000

Before **EBEL** and **MURPHY,** Circuit Judges.

Petitioner-appellant Rajani K. Kanth seeks an order of this court enjoining divorce proceedings in Utah state court during the pendency of his appeal from the district court's order denying his petition pursuant to the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610, and the Hague Convention on the Civil Aspects of International Child Abduction. In. order to obtain injunctive relief pending appeal, an appellant must show (1) that he will likely be successful on appeal; (2) that he will be irreparably harmed if the injunction is

not granted; (3) that the opposing party will not be harmed if the injunction is granted; and (4) that the public interest does not oppose granting the injunction.

See 10th Cir. R. 8.1.

Upon consideration of appellant's motion and the applicable law, this court concludes that he has failed to demonstrate satisfaction of the above standards. Accordingly, his motion for injunctive relief pending appeal is denied.

Entered for the Court
PATRICK FISHER, Clerk

By L. Bahyano
Deputy Clerk

APPENDIX 'E'

Tenth Circuit Denial of a Request for a Hearing

United States Court of Appeals for the Tenth Circuit
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303)844-3157

Patrick J. Fisher, Jr.
Clerk of Court

Elisabeth A. Shumaker
Chief Deputy Clerk

April 13, 2000

Rajani K . Kanth
Copthorne Orchid Hotel
214, Dunearn Road
Singapore, 00000

Mr. Frederick N. Green
Green & Berry
10 Exchange Place
#622
Salt Lake City, UT 84111

Re: 99-4246, Kanth v. Kanth
Dist/Ag docket: 99-CV-532-C,

Dear Counsel:

This case has been referred to a three-judge panel to determine whether oral argument is necessary. After examination of the briefs and record on appeal, the panel is unanimously of the opinion that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

The court will submit the case on the briefs and record for final disposition.

Please contact this office if you have questions.

Sincerely,

PATRICK FISHER
Clerk

PF:jal

By: Deputy Clerk

APPENDIX 'F'

Utah Court Order Granting Temporary Custody to Respondent While Hague Appeal is Pending in the Tenth Circuit

GREEN & BERRY
FREDERICK N. GREEN (1240)
Attorneys for Petitioner
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CORY LEIGH KANTH, Petitioner, vs. RAJANI KANNEPALLI KANTH Respondent.	**ORDER AND RECOMMENDATION** **Civil No. 994904256** **Judge Anne M. Sitrba** **Commissioner** **Thomas N. Arnett**

The above entitled matter came on regularly for hearing before the Honorable Commissioner Thomas N. Arnett on the 20th day of January, 2000 based upon the Petitioner's Order to Show Cause seeking various temporary relief. The Court also

considered the Respondent's motion for a stay of these proceedings or, in the alternative, their abatement pending the resolution of the Australian divorce action. Based upon the file including the Petitioner's affidavit, and the proffer of counsel, as well as argument, and the Court being fully advised, it is, hereby,

ORDERED, ADJUDGED AND DECREED as follows:

1. The Respondent's motion for stay of proceedings or their abatement is and is hereby denied for the following reasons:

a. The Petitioner is seeking temporary relief and not a final order by the Order to Show Cause and therefore this decision is not one "on the merits" and thereby contemplated by Article 16 of the Hague Convention.

b. The Respondent has not sought and the Court has not granted any stay in the Federal Court proceedings specifically a stay as to the dismissal of Mr. Kanth's petition in Federal Court.

c. This Court has jurisdiction over both of the parties inasmuch as they have conducted their marital relationship in Utah and Mr. Kanth was served with process in the State of Utah.

d. There is a need in this case for some temporary order governing the parties relationships between themselves and the children, and establishing support given the current circumstances.

2. The Petitioner is awarded the sole care, custody and control of the minor children of the parties subject to restricted visitation and the Respondent which would restrict the Respondent's exercise of visitation outside of Salt Lake County without appropriate safe cards including the entry of a "mirror order" entered by the jurisdiction wherever the Respondent may travel with the children. Any such visitation shall be "phased in" in a manner which serves the best interest of the children.

3. Commencing January 19, 2000 the Respondent shall pay the Petitioner as and for child support in the sum of $896 per

month.

4. Commencing January 19, 2000 the Respondent shall pay the Petitioner the sum of $2,000 per month as and for temporary alimony.

5. The financial payments and financial responsibility of the Respondent shall be governed by and paid according to the Utah Uniform Civil Liability for Support Act.

6. The Respondent shall maintain or acquire available health, medical, dental, and life insurance for the benefit of the parties and the children during the pendency of this action and the cost or expense for the premiums of the health insurance shall be borne according to the Utah Uniform Civil Liability for Support Act and the parties shall divide equally any non covered medical expenses as well as any work related child care expenses.

7. Based upon the Stipulation of the Petitioner the issue as to the retroactivity of this order shall be reserved for further hearing.

8. Given the fact that Mr. Kanth has not responded to the Order to Show Cause but, rather, relied solely upon his motion for stay, this order may be reviewed prospectively by the Court at such time as the Respondent seeks that review. This order shall be subject to further order of the Court.

9. The Petitioner may, likewise, revisit the issue of retroactivity as well as the other issues raised in the Order to Show Cause including, but not limited to temporary attorneys fees and costs.

10. Based upon the Stipulation of the Petitioner the Court's denial of the Respondent's motion for stay, which contemplates the Respondent's appearance in this action and the filing of a pleading in response to the Petition, shall not be deemed an act of "acquiesce" on the part of the

Respondent in connection with any Hague Convention proceedings.

DATED THIS 22nd day of March, 2000.

BY THE COURT:

HONORABLE ANNE M. STIRBA
DISTRICT COURT JUDGE

DATED THIS 17 day of March, 2000.

BY THE COURT:

HONORABLE THOMAS N. ARNETT
DISTRICT COURT COMMISSIONER

CERTIFICATE OF HAND DELIVERY

F6

I hereby certify that a full, true and correct copy of the above and foregoing **RECOMMENDATION AND ORDER** was placed in the United States mail at Salt Lake City,Utah, with first-class postage thereon fully prepaid, on the 29 day of January 2000 addressed as follows:

Lisa A. Jones
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, Utah 84111

APPENDIX 'G'

Transcript of Hearing to Recapture Petitioner's Hague Case After it's Wrongful Dismissal by the Utah District Court

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF UTAH CENTRAL DIVISION

RAJANI K. KANTH PETITIONER, VS. CORY LEIGH KANTH, RESPONDENT,	CIVIL NO. 2:99-CV-532C SALT LAKE CITY, UTAH OCTOBER 18, 1999

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE TENA CAMPBELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
RAJANI K KANTH (PRO SE)
WAGNER COLLEGE
SOCIAL SCIENCES
ONE CAMPUS DRIVE
STATEN ISLAND, NEW YORK 10301

FOR THE PLAINTIFF:
GREEN AND BERRY
BY: FREDERICK N. GREEN ESQ.

622 NEWHOUSE BUILDING
10 EXCHANGE PLACE
SALT LAKE CITY, UTAH 84111
(801) 363-5650

COURT REPORTER :

RAYMOND P. FENLON
350 SOUTH MAIN STREET, #242
SALT LAKE CITY, UTAH 84101
(801) 809-4634

PROCEEDINGS

OCTOBER 18, 1999

1:10 P.M.

THE COURT: GOOD AFTERNOON. WE'RE HERE IN THE MATTER OF KANTH V. KANTH, 99-CV-532, HERE- - REALLY I'M VIEWING THIS AS A STATUS CONFERENCE. REPRESENTING THE PLAINTIFF IS MR. RICK GREEN, AND I NOTE THE PRESENCE OF MS. COREY KANTH. THE DEFENSE IS REPRESENTING HIMSELF, MISTER - - AND MAKE SURE I PRONOUNCE THIS CORRECTLY– RAJANI– AM I SAYING THAT? RAJANI KANTH. ALL RIGHT.

I WANT THE PARTIES TO KNOW THAT FIRST IN MY MIND IS RECOGNITION - - AND I THINK I MADE THAT REAL CLEAR TO YOU AT THE AUGUST 24TH HEARING – THAT I HAVE HAD JUST THE SMALLEST BIT OF THIS CONTROVERSY. I HAVE THE JURISDICTION OVER

ONLY ONE QUESTION, AND THAT IS THE PETITION THAT WAS FILED BY MR. KANTH FOR THE RETURN OF HIS CHILDREN, AND I HAVE NO JURISDICTION OVER THE OTHER ISSUES THAT ARE IN THE SETTLEMENT AGREEMENT.

AND I THINK AS I MADE CLEAR AT THE HEARING WHEN YOU THOUGHT THAT THIS MATTER WAS RESOLVED, ALTHOUGH THE SETTLEMENT AGREEMENT WAS READ INTO THE RECORD, THAT REALLY HAS NOTHING TO DO WITH THE ISSUE THAT I HAVE. AND WITH THAT IN MIND, AS I REVIEWED THE TRANSCRIPT AND THE COURT DOCKET, THERE IS NOTHING IN ANY WAY THAT CLOSES THIS CASE. IN FACT, MY LAST WORDS ARE "THEN WHAT I WOULD ASK OF YOU, SINCE I UNDERSTAND YOUR NEED TO PUT IT" – THAT WAS THE SETTLEMENT– ON THE RECORD, BUT I WOULD ASK THAT YOU VERY

QUICKLY FILE THE AGREED DISMISSAL OF THE PETITION UNDER THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT BECAUSE THAT IS THE ONLY MATTER OVER WHICH I HAVE JURISDICTION, AND WILL MAKE SURE THAT IT IS FILED. ALL RIGHT."

AND OF COURSE FOR THE REASONS THAT ARE SET FORTH HERE, WHATEVER, THAT WAS NOT DONE. SO THE WAY THE CASE IS NOW BEFORE ME , THE PETITION IS NOT DISMISSED. IT IS STILL THERE. THE STATUS IS IT'S STILL THERE. AND AS FAR AS THE PLEADING BY MS. KANTH'S ATTORNEY ON THE SETTLEMENT AGREEMENT, MR GREEN, I JUST DON'T HAVE JURISDICTION OVER IT. THE SETTLEMENT AGREEMENT ARISES OUT OF THE STATE ISSUES, THE DOMESTIC MATTERS, AND I AS A FEDERAL COURT SIMPLY CANNOT AND DO NOT ADJUDICATE THOSE ISSUES, AND BECAUSE WHAT I HAVE IS JUST THE ONE

PART. IT'S STILL ON GOING. I HAVE JURISDICTION OVER IT, AND MY VIEW IS WE JUST SET DOWN A TIME FOR HEARING AND IF THERE'S ANY FURTHER BRIEFING. THAT'S WHAT I THINK.

MR. GREEN: WE ARE NOT ASKING THIS COURT TO ENTERTAIN ANYTHING AT ALL REGARDING THE STATES COURT ACTION. AND IF I WAS LESS THAT CLEAR THAN IN MY PLEADINGS, THEN I APOLOGIZE.

THE COURT: NO. NO NEED TO - - I JUST PROBABLY MISUNDERSTOOD.

MR. GREEN: I BELIEVE IT'S JUST THE OPPOSITE. I THINK THAT IT IS MR. KANTH WHO IS LINKING THE DISMISSAL OF THE HAGUE CONVENTION PETITION TO THE STATE COURT STIPULATION.

THE COURT: EXCEPT THERE IS NO DISMISSAL.

MR. GREEN: MY UNDERSTANDING WAS THAT IN GRANTING THIS HEARING, THE COURT WAS

TREATING THE ACCEPTANCE OF OUR STIPULATION TO DISMISS THE HAGUE CONVENTION PROCEEDING AS A RULE 60(B) MOTION.

THE COURT: AND I BELIEVE THAT I LED YOU IN THAT PATH. AND AS I LOOKED INTO THE FILE - - AND IM SORRY IF I DID - - I LOOKED AT THE OFFICIAL DOCKET, AND I LOOKED AT THE RECORD. AND ALTHOUGH CERTAINLY THERE WAS - - AND YOU'RE RIGHT, MR. GREEN, THERE WAS AN ORAL STIPULATION. THERE WAS NO ORDER OF FORMAL DISMISSAL. AND WITHOUT THAT, I THINK WERE I TO SAY THE PETITION WAS DISMISSED, AND IF THAT MATTER WERE APPEALED, WE'D BE HERE– BACK HERE SO FAST FROM THE TENTH CIRCUIT THAT OUR HEADS WOULD SWIM.

MR. GREEN: POSSIBLY. I HAVE TWO THOUGHTS ON THAT. NUMBER ONE, WE DID SUBMIT AN ORDER

APPROVED BY MR. KANTH'S ATTORNEY PRIOR TO HIS DISMISSAL, APPROVED BY MR. DIAZ, AND WHERE THAT IS HERE I DON'T KNOW, BUT IT WAS SUBMITTED TO HIM. I HAVE A PHOTO COPY IN MY FILE APPROVED BY MYSELF. HEATHER WHITE AND MR. DIAZ.

THE COURT: YOU KNOW, THINGS GET LOST HERE, BUT IT SURE DIDNT MAKE IT HERE. IT DIDN'T MAKE IT INTO OUR – IT DID NOT – NO. IT DIDN'T COME HERE.

MR. GREEN: I DON'T THINK MR. KANTH WOULD DENY THE FACT THAT THAT OCCURRED. IN FACT, HIS OWN FILINGS ACKNOWLEDGE THAT MR. DIAZ SIGNED THE DOCUMENT. HE CLAIMS THAT MR. DIAZ DID NOT HAVE AUTHORITY TO SIGN TO DOCUMENT.

THE COURT: OKAY. WELL–

MR. GREEN: AND WE DID THAT QUITE

PROMPTLY, WITHIN THE NEXT DAY FOLLOWING THE HEARING. I BELIEVE IT TOOK MR. DIAZ A WEEK OR SO TO SIGN IT, AND I'D BE HAPPY TO SUPPLY THE COURT WITH THAT ORDER.

SECONDLY UNDER THE STATE LAW, WHICH I THINK GOVERN THE SUBSTANTIVE ISSUES. IF NOT THE PRECIDURAL ISSUES IN THIS CASE, I WOULD REQUEST THE COURT GIVE ME AN OPPORTUNITY TO BRIEF THE LEGAL EFFECT ON THE COURT'S RULING ACCEPTANCE THE STIPULATION.

THE COURT: WELL, BEFORE I REALLY GOT TO THINKING ABOUT IT AND I BELIEVED THAT THERE WAS NO ORDER- AND I'LL LOOK AND SEE WHERE THAT IS. THINGS GET LOST HERE- BUT EVEN IF THERE HAD BEEN - IF THERE WAS, AND I HAVE NO DOUBT ABOIUT IT FROM WHAT YOU TELL ME, MR. GREEN, AN ORDER THAT WAS RECEIVED HERE AND

THAT YOU BELIEVED AND HAD REASON TO BELIEVE ENDED THIS MATTER, THEN WHERE I THINK WE WOULD BE LOOKING WOULD BE, SINCE IT ISN'T A FINAL JUDGEMENT OR IT'S MORE IN THE MOTION OF A 55(B), WE'D BE LOOKING AT IT FOR A GOOD CAUSE STANDARD. I THINK THAT'S WHAT WE'RE LOOKING AT.

AND I KNOW THAT YOU DISPUTE, AND YOU HAVE SOME VERY GOOD GROUNDS, YOU DISPUTE VERY ARDENTLY MR. KANTH'S STATEMENT THAT THERE WAS NO AUTHORITY. BUT IT SEEMS TO ME THAT IN THE EXCESS OF CAUTION, AND GIVEN THE WAY THAT THE COURTS ARE TREATING THESE PETITIONS, AND THE DESIRE OF COURTS TO SETTLE THESE ISSUES ON THE MERITS, THAT THE FAR WISER COURSE WOULD BE SIMPLY GO AHEAD AND HAVE THE HEARING THAT WE WERE ALL READY TO DO ON

AUGUST 24TH.

I MEAN, MR. GREEN, YOU'VE PUT TOGETHER A COMPREHENSIVE SET OF MATERIALS, AND I RECOGNIZE IT'S TAKEN YOU A TREMENDOUS AMOUNT OF TIME, AND ALL – AND ITS ALL MRS. KANTHS FAMILY AND AFFIDAVITS. ITS SEEMS TO ME THAT WE SHOULD JUST , FOR THAT SAKE OF ADJUDICATING ISSUES ON THE MERITS, JUST GO AHEAD AND DO IT. WOULD YOU SUFFER PREJUDICE, OTHER THAN THE INEVITABLE PREJUDICE OF ALL YOUR WITNESSES WOULD HAVE TO BE-CALLED, ETCETERA? ANYTHING SUBSTANTIAL THAT YOU WOULD SUFFER IN THE MATTER OF PREJUDICE?

MR. GREEN: I UNDERSTAND WHAT THE COURT IS SAYING, AND I APPRECIATE THAT. THAT IS SOMETHING THAT I THINK THE COURT ALONE CAN MAKE SAME JUDGEMENT ON THAT IS

DISCRETIONARY WITH THE COURT AS TO WHEATHER OR NOT THERE IS EXCUSABLE NEGLECT, WHETHER THERE IS A GOOD CAUSE STANDARD MET. AND I THINK THE COURT KNOWS EXACTLY WHAT WE ARE SAYING THERE. AND IF I UNDERSTAND WHAT THE COURT IS SAYING, IT IS THAT PERHAPS THIS CASE DESERVES ITS DAY IN COURT.

THE COURT: AND THAT'S WELL PUT. THAT'S EXACTLY WHAT IM SAYING.

MR. GREEN: AND I SYMPATHIZE WITH THE COURT'S FEELINGS. I'VE MADE THE ARGUMENT MANY TIMES MYSELF THAT THAT IS A VALUABLE AND AN IMPORTANT RIGHT. IT IS SIMPLY OUR FEELING THAT ONCE YOU ENTER A CONTRACTUAL ARRANGEMENT, THAT THIS WHOLE SYSTEMS OF COURTS AND AGREEMENTS AND STIPULATIONS WORKS VERY WELL AS LONG AS WE ABIDE BY

CURTAIN RULES. WE THOUGHT WE DID. AND I WON'T TAKE THE TIME TO BELABOR THAT ARGUMENT. I THINK THE COURT HAS IT BEFORE IT. AND IF THE COURT IS SIMPLY SAYING THAT, AGAIN, IN AN ABUNDANCE OF CAUTION TO LET THE MATTER NE HEARD AND HAVE MR. KANTH HIS DAY IN COURT, I UNDERSTAND THAT, AND I TRUST MY CLIENTS WILL AS WELL, YOUR HONOR.

THE COURT: AND, YOU KNOW IT NAY BE - - AND I DON'T KNOW, AND I OFFER NO OPINION OR ANYTHING – BUT AT THE OUTCOME OF THIS CASE, I DON'T KNOW, THERE MIGHT BE SOME ADJUSTMENT MADE THERE.

MR. GREEN: IF WE CAN RESERVE THAT ISSUE, YOUR HONOR, AND POSSIBLY EVEN RESERVE FOR PURPOSES OF EVIDENCE THE QUESTION OF THE BINDING NATURE OF THE AGREEMENT WE

REACHED, THAT COULD MITIGATE SOME OF MY DIFFICULTIES.

THERE IS ONE OTHER FORM OF PREJUDICE THAT WE SUFFER, YOUR HONOR. IT IS THE POSITION OF MR. KANTH THAT THE PENDENCY OF THIS CASE BEFORE YOUR HONOR STAYS ANY PROCEEDINGS IN THE STATE COURT, WHICH IS ONLY LOGICAL UNTIL WE DETERMINE JURISDICTION. THAT IS A SIGNIFICANT PROBLEM. WE ARE WITHOUT A CUSTODY ORDER. WE ARE WITHOUT A TEMPORARY ORDER. WE ARE WITHOUT ANY ORDER WHATSOEVER IN THE STATE COURT.

THE COURT: I'M READY TO MOVE FAST IF YOU ARE.

MR. GREEN: WELL, WE HAVE MOVED FAST, AND IT WILL BE- WE DID RESCHEDULE EVERYTHING, AS THE COURT WILL RECALL, FOR THE AUGUST 24TH OR 25TH

HEARING. AND WHAT THE COURT TOLD US AT THAT TIME IS THAT IT WOULD BE SOME TIME BEFORE COULD RESCHEDULE. I WOULD ASK THE COURT'S INDULGENCE, BECAUSE I AM PROBABLY INTO THE LAST WEEK OF NOVEMBER OR THE FIRST WEEK OF DECEMBER MYSELF ON CONFLICTS THAT WOULD BE SUBJECT TO THIS COURT'S CALENDAR, OF COURSE.

THE COURT: I COULD TAKE YOU EARLIER.

MR. GREEN: WHAT I'M SAYING IS I KNOW YOU COULD, AND I THINK IN THE BALANCE THAT THAT MIGHT EVEN WORK A GREATER PREJUDICE ON MY CLIENT OR OTHER CLIENTS. MY OTHER THINKING ON THE SUBJECT IS THAT IT MAY VERY WELL BE, YOUR HONOR, THAT THIS MATTER IS ENTIRELY MOOTED NOW. THE COURT WILL RECALL OUR ARGUMENT THAT MR. KANTH NOW RESIDES IN NEW YORK CITY; THAT BEFORE THIS MATTER WAS TO BE

HEARD IN AUGUST, HE HAD SIGNED A CONTRACT FOR ONE YEAR' EMPLOYMENT THERE, WHICH IS A LONGER PERIOD OF TIME THAT HE EVER SPENT IN AUSTRALIA. THE IMPORTANCE OF THAT IS THAT EVEN IF MR. KANTH IS CORRECT THAT JURISDICTION FOLLOWS THE PETITIONER, HIM IN THIS CASE, IF JURISDICTION BY WAY OF HABITUAL RESIDENCE FOLLOWED MR. KANTH, IT WOULD STILL LODGE IN UTAH, UNITED STATES, UNDER THAT SITUATION TO MY WAY OF THINKING, THAT PROBABLY IS THE MOST COMPELLING FACT HERE. NOT ONLY DOES HE NOT RESIDE HERE, AND FOR AN INDEFINITE PERIOD OF TIME, FOR AT LEAST A YEAR IF HE ABIDES BY HIS CONTRACT, BUT THE CREDIBILITY ISSUES AND NOT RAISING THAT WITH YOUR HONOR WHEN HE KNEW IT AND WE DID NOT.

THE COURT: ALL RIGHT, THANKS.

MR. GREEN: THANK YOU, YOUR HONOR.

THE COURT: MR. KANTH, WHERE ARE YOU LIVING NOW.

MR. KANTH: YOUR HONOR, I AM NOW CURRENTLY IN NEW YORK CITY, AND I THINK I MADE CLEAR IN MY REPLY–

THE COURT: IF YOU COULD COME FORWARD, SIR. WE CAN JUST HEAR YOU A LITTLE BETTER. THANKS.

MR. KANTH: YOUR HONOR, I CAME TO THIS COUNTRY TO PURSUE THE HAGUE CASE. I FOUND THAT GIVEN MY AUSTRALIAN SALARY–

THE COURT: IF YOU HAVE COULD JUST SPEAK–

MR. KANTH: I SIMPLY COULD NOT AFFORD TO PAY AMERICAN LAWYERS ON AN AUSTRALIAN SALARY, WHICH IS WHY I TOOK LEAVE FROM THE UNIVERSITY AND I SOUGHT A TEMPORARY POSITION, WHICH IS WHAT I HAVE CURRENTLY, PURELY WITH

A VIEW OF PURSING MY HAGUE CASE. AND I THINK I SUBMITTED A DOCUMENT IN MY REPLY. IT'S AND AUTHORITIVE OPINION ON THE HAGUE THAT SUGGESTS THAT MY TEMPORARY OR EVEN PERMANENT RESIDENCE ANYWHERE OUTSIDE AND AFTER THE DATE OF FILING OF THE HAGUE PETITION IS IMMATERIAL TO THE RETURN OF THE CHILDREN. THAT'S A DOCUMENT THAT SAYS THAT. BUT ALL I'M SAYING IS I'M HERE TEMPORARILY; AT THE MOMENT THE HAGUE CASE IS OVER, YOUR HONOR, I'LL BE BACK IN AUSTRALIA.

THE COURT: ALL RIGHT. WELL, I'M GOING TO GRANT MR. KANTHS MOTION TO PROCEED WITH THIS CASE. I FIND THAT GOOD CAUSE AND INTERESTS OF MAKING SURE THAT THESE IMPORTANT ISSUES ARE DECIDED ON THE MERIT WEIGH IN FAVOR OF DECIDING THIS CASE ON THE

MERITS AND HEARING THE EVIDENCE AND HEARING THE LEGAL ARGUMENTS.

TALKING ABOUT SCHEDULING, IS THERE SUCH A THING, MR. GREEN– AND I DON'T KNOW IF YOU KNOW, MR. KANTH – IS DISCOVERY EVER TAKEN IN THESE MATTERS BEFORE? I'M JUST WONDERING ABOUT THE ASSISTANCE THAT PERHAPS DEPOSITIONS WOULD GIVE US.

MR. GREEN: I JUST MADE A NOTE OF THAT, YOUR HONOR. THESE PROCEEDINGS–

I DIDN'T MEAN TO DISPLACE YOU, MR. KANTH, BY ALL MEANS.

THERE IS NO SET OF RULES THAT SUGGEST WE FOLLOW A DIFFERENT TIMETABLE OR A DIFFERENT SET OF RULES. WE HAVE PROPOUNDED DISCOVERY THAT HAS NOT BEEN RESPONDED TO. AS IT HAPPENS, WE SCHEDULED THIS HEARING IN FRONT

OF YOUR HONOR BECAUSE IT COINCIDED WITH MR. KANTH'S DEPOSITION SCHEDULED FOR TOMORROW. WE WOULD ASK LEAVE OF THIS COURT TO PROCEED WITH THAT, AS LONG AS WE HAVE MR. KANTH HERE.

THE COURT: THAT MAKES SENSE, MR. KANTH. AND IT SEEMS TO ME THAT ANY FACTUAL ISSUES THAT YOU CAN KIND OF MAKE CLEAR FOR ME, THAT I HAVE THE BENEFIT OF KNOWING BEFORE THE HEARING, THE BETTER I'M GOING TO BE PREPARED TO DECIDE THIS. SO YOU HAVE A DEPOSITION. I'D ASK YOU TO APPEAR. AND THEN THE RIGHT IS RECIPROCAL. YOU YOURSELF HAVE THE RIGHT TO GIVE DISCOVERY- MAKE DISCOVERY REQUESTS OF THE - MRS. KANTH, AND YOU KNOW THAT I'M SURE.

MR. KANTH: YOUR HONOR, I'D JUST LIKE TO HAVE CLARIFIED THE ISSUES OF WHAT A DEPOSITION ACTUALLY IS IN THE TERMS OF HAGUE,

BECAUSE AS FAR AS I KNOW--AND I HAVE RESEARCHED THE HAGUE MATTERS QUITE EXHAUSTIVELY – I HAVE NOT SEEN A REFERENCE TO THAT PARTICULAR TERM.

THE COURT: WHAT IT WILL BE, AND – WHAT IT WILL BE WILL BE THE QUESTIONING THAT WILL BE MADE OF YOU. QUESTIONS WILL BE ASKED AND YOU WILL GIVE ANSWERS. AND THEY WILL FOCUS -AND IT'S USUALLY NOT A NARROW FOCUS BECAUSE DISCOVERY IS A LOT BROADER THAN A TRIAL. AND THE ISSUE WOULD BE, I WOULD IMAGINE, YOUR RESIDENCE, YOUR HABITUAL RESIDENCE, ETCETERA. AND ALSO THERE ARE OTHER DEFENSES THAT MRS. KANTH RAISED IN HER RESPONSE TO YOUR PETITION CONCERNING PARENTING AND RELATIONSHIPS, AND I WOULD IMAGINE THEY WILL SOON BE GOTTEN INTO.

WHICH JUST BRINGS TO MY MIND, MR. KANTH - AND I RECOGNIZE ATTORNEYS ARE VERY EXPENSIVE, AND WELL WORTH THE MONEY - BUT YOU MIGHT WELL THINK ABOUT TRYING TO GET YOURSELF SOME LEGAL REPRESENTATION, JUST BECAUSE YOU NEED- MIGHT NEED SOME HELP IN DEALING WITH THOSE KINDS OF ISSUES, AND IT MIGHT BE OF GREAT ASSISTANCE TO YOU, PARTICULARLY SINCE YOU'RE NOT HERE EXCEPT ON LIMITED TIMES . SO THAT'S JUST A SUGGESTION I THROW OUT TO YOU.

MR. KANTH: THANK YOU.

THE COURT: OKAY.

MR. GREEN: ONE OTHER MATTER, YOUR HONOR. I HAVE LOCATED THE ORDER, MY PHOTO COPY ALBEIT, THAT I'D LIKE TO LODGE WITH YOUR CLERK, IF THAT IS ACCEPTABLE.

THE COURT: JUST GIVE IT TO ME AND LET ME SEE

IT, AND IM GOING TO FIND OUT WHERE THE ORIGINAL WENT.

MR. GREEN: I BELIEVE I RECEIVED THE ORDER FROM MR. DIAZ AFTER HE SIGNED IT, AND HENCE MADE THE PHOTOCOPY THAT YOU SEE, AND I PROBABLY SENT IT TO HEATHER WHITE AFTERWARDS. TO THE EXTENT THAT THAT HAS BEARING ON THIS MATTER, IT WILL SOON SHOW THAT IT WAS MAILED, I BELIEVE. TO MR. DIAZ ON THE 27TH.

WHEN AFTER THAT TIME WE RECEIVED IT BACK FROM HIM, I DON'T KNOW, BUT MY RECOLLECTION IT WAS ABOUT A WEEK. SO I SAY THAT ONLY TO LET THE COURT KNOW WE TRIED TO COMPLY, AND I THINK WE DID–

THE COURT: AND I TELL YOU WHAT. UNDOUBTEDLY ANY ERROR WAS OURS. SO I WILL

SIMPLY LODGE THIS, BUT WE'LL GO AHEAD.

YES, SIR, MR. KANTH.

MR. KANTH: COULD I MAKE ONE COMMENT ON THIS PARTICULAR DOCUMENT?

THE COURT: SURE.

MR. KANTH: I DISCHARGED MY COUNSEL ON THE VERY SAME DAY AFTER I FELT THAT THEY HADN'T FULFILLED THE TERMS OF OUR AGREEMENT. AND I PARTICULARLY INFORMED MR. DIAZ WHEN MR. HILTON HAD LEFT FOR CALIFORNIA THAT HE WAS NOT AUTHORIZED TO SIGN ANY DOCUMENT WITHOUT MY EXPLICIT PERMISSION, AND HE NONETHELESS WHEN AHEAD AND OBVIOUSLY DID ALL KINDS OF THINGS ON HIS OWN. I JUST WANT TO LET YOU KNOW THAT HE WAS NO LONGER MY COUNSEL ON THAT VERY

THE COURT: ALL RIGHT. AND I WILL SIMPLY

HAVE THAT LODGED. AND IT WILL BE - MR. KANTH, I DIDN'T SIGN IT.

MR. GREEN: MAY I REFLECT IN THE ORDER, YOUR HONOR, THAT THE MOTION IS GRANTED; THAT WE WILL SCHEDULE A TRIAL; THAT WE CAN CONTINUE WITH DISCOVERY, AND THAT THE ISSUE OF PREJUDICE TO MY CLIENT, FINANCIAL OR OTHERWISE, CAN BE RAISED AT TRIAL AND-

THE COURT: IT'S NOT EXACTLY A TRIAL, IS IT? IT'S JUST LIKE WE WERE READY TO GO ON THE LAST TIME.

MR. GREEN: AN EVIDENTIARY HEARING IS PROBABLY MORE ACCURATE, YOUR HONOR. AND THAT WE CAN INTRODUCE EVIDENCE REGARDING THE STIPULATION AND THE CONTRACT?

THE COURT: WELL, LET ME JUST SAY, MR. GREEN, THAT I AM NOT GOING TO HEAR AT THAT TIME THE

QUESTIONS OF - FRANKLY WHAT WE'RE TALKING ABOUT IS WHETHER MR. KANTH IS GOING TO HAVE TO PERHAPS PAY FOR THE ADDITIONAL COSTS OF CONTINUING THE HEARING.

MR. GREEN: VERY WELL.

THE COURT: ALL RIGHT. BECAUSE IT MAY BE THAT THAT WONT BE APPROPRIATE. AND WHAT - ORDINARILY HOW I TAKE CARE OF THESE IN OTHER CONTEXTS WOULD BE I WOULD HAVE A MOTION FILED FOLLOWING MY RESOLUTION OF THE ISSUES OF - ON THE PETITION- IN OTHER WORDS, WHERE WILL THE CHILDREN GO? AND THEN IF I FEEL THAT IT IS APPROPRIATE, I WILL ASK FOR A MOTION AND A MEMORANDUM AND AFFIDAVITS, AND THAT'S USUALLY THE BETTER WAY TO DO SO . LET'S KEEP OUR TIME ON THE HEARING TO THE QUESTIONS RAISED UNDER THE PETITION.

MR. GREEN: AND WILL WE CONTINUE WITH THE SAME SCHEDULING ORDER THAT WAS - EXCEPT FOR THE DATE - THAT THE COURT ALREADY ENTERED IN THIS CASE?

THE COURT: I CAN'T REMEMBER MUCH WHAT IT WAS .

MR. GREEN: THE ORDER BASICALLY DICTATED THE PROSSES, INDICATING THAT THE PARTIES WOULD SUBMIT DOCUMENTARY EVIDENCE AND AFFIDAVITS; THAT THE WITNESSES WOULD THEN BE PRESENT FOR CROSS - - EXAMINATION PURPOSES ONLY, WHICH I BELIEVE IS THE ONLY WAY WE'LL KEEP THIS WITHIN ANY REASONABLE TIME FRAME; AND THAT THE COURT WOULD RELAX STANDARDS OF ADMISSIBILITY BUT STILL WOULD REQUIRE SOME MINIMUL LEVEL OF AUTHENTICITY FOR THE EVIDENCE.

THE COURT: WELL, YEAH. IT SEEMS TO ME THAT THAT'S WISE, BUT DO WE NEED FURTHER BRIEFING?

MR GREEN: I DON'T BELIEVE SO. I THINK, YOUR HONOR, WE WERE PREPARED TO GO. WE HAD REQUESTED THE DEPOSITION, IN FACT HAD NOTICED TO MR KANTH'S DEPOSITION, AS WELL AS WRITTEN DISCOVERY, WHICH WAS IN DEFAULT AT THE TIME OF THE EARLIER TRIAL. I WOULD HOPE THAT THAT WOULD BE ANSWERED. BUT ASIDE FROM THAT, NO, I WOULD HOPE WE DON'T HAVE TO REINVENT THE WHEEL AND THAT WE CAN PROCEED ON WHAT'S BEFORE THE COURT NOW.

THE COURT: MR KANTH, DO YOU ANTICIPATE THAT YOU'LL NEED TO FILE ANYTHING FURTHER WITH ME, ANY MATERIALS, ANTHING ALONG THOSE LINES?

MR KANTH IF SO, YOUR HONOR, I'LL DO IT AS

FAST AS POSSIBLE

THE COURT: WELL, LET ME JUST INSTRUCT YOU. LET'S SET DOWN, FIRST OF ALL, THE DATE AND TIME FOR THE HEARING, AND THEN WELL WORK BACKWARDS.

YOU SAY, MR. GREEN YOU CANNOT DO ANYTHING UNTIL END OF NOVEMBER.

MR GREEN: END OF NOVEMBER, PROBABLY THE FIRST OWEEK OF DECEMBER WILL BE PRETTY FAIR TO SAY

THE COURT: AND YOU DON'T LIVE HERE, MR KANTH, SO WHAT'S YOUR SCHEDULE?

MR KANTH: YOUR HONOR, MY INSTITUTION IS PERFECTLY AWARE AS TO WHY I'M HERE AND THE CONDITIONS FOR WHY I'M HERE, SO ANYTIME I'M REQUIRED, I CAN MAKE IT.

THE CLERK: DECEMBER 6TH WE COULD DO IT IN

THE MORNING

THE COURT: DECEMBER 6TH IS THAT GOING TO WORK

MR GREEN: IN ALL LIKELIHOOD FOR ME, YOUR HONOR.

I BELIEVE THAT MY CLIENT HAS A CONFLICT ON THAT FIRST WEEK; IF WE COULD GO TO THE SECOND WEEK.

THE COURT: OKAY, WE'LL HAVE SOME TROUBLES IF WE GET BEYOND THAT I THINK.

ARE YOU FREE, MRS. THE 9TH OF DECEMBER?

MR KANTH: I COULD DO IT.

THE COURT: HOW ABOUT YOU, MRS KANTH? ARE YOU FREE? THAT'S THE SECOND WEEK.

MRS KANTH: YES

THE COURT: LET'S DO IT IN THE AFTERNOON, 2:45.

YES, SIR?

MR KANTH: YOUR HONOR, I JUST RECALL ONE SMALL MATERIAL FACT IN RELATION TO THE DEPOSITION THAT YOU HAVE FOR TOMORROW. THERE IS AN ATTORNEY THAT I'VE BEEN SPEAKING WITH, GIVEN THE POTENTIAL OF THE REINSTATEMENT OF THE HAGUE. HER NAME IS LISA JONES. AND SHE IS AWARE, BUT SHE IS OUT OF TOWN. I BELIEVE SHE'S BACK IN A COUPLE OF DAYS. I WOULD LIKE MR. GREEN TO WAIT. IF I'M TO HAVE AN ATTORNEY, I'D RATHER HAVE HER PRESENT DURING THESE DEPOSITIONS. AND IT WON'T BE MORE THAN A DAY OR TWO AS FAR AS I KNOW. SHE'S OUT FOR A SMALL VACATION.

THE COURT: WELL WHAT DO YOU SAY MR. GREEN?

MR. GREEN YOUR HONOR, I'VE TALKED TO MS. JONES. SHE SAID THAT SHE WOULD INDEED BE GONE. SHE DOES INDEED REPRESENT MR. KANTH IN THE

STATE COURT PROCEEDINGS. SHE WOULD SEND SOMEONE TO COVER THE DEPOSITION. I HAVE NO PROBLEM SETTING ANOTHER DATE IF MR. KANTH WISHES TO TRAVEL HERE FOR THAT DATE, BUT I WOULD WANT IT AT MY DISCRETION BECAUSE OF WHAT I JUST DESCRIBED, A VERY WHAT I THINK IS A DIFFICULT SCHEDULE.

THE COURT: BUT I WANT TO BE ABLE TO HAVE A COPY OF THAT TRANSCRIPT.

MR. GREEN: I'M SURE.

THE COURT: SO WHAT I'M GOING TO DO IS I'M GOING TO GRANT YOUR MOTION. HOWEVER, MR. KANTH, YOU MUST APPEAR WITHIN–

HOW MANY WEEKS ARE YOU SAYING YOU WANT TO HAVE IT, MR. GREEN? TWO WEEKS?

MR. GREEN: TWO WEEKS WOULD PROBABLY WORK, YES.

THE COURT: WITHIN A TWO WEEK PERIOD.

MR. GREEN: BARRING SOME OTHER AGREEMENT WITH COUNSEL, I WOULD SUGGEST.

THE COURT: BARRING ANOTHER AGREEMENT, AND IT WILL BE AT THE DISCRETION OF MR. GREEN.

MR. KANTH: THAT'S ALL RIGHT.

THE COURT: BUT I UNDERSTAND THAT WILL BE A GOOD FAITH DISCRETION.

MR. GREEN: THAT WOULD WORK FOR ME, YOUR HONOR.

THE COURT: THEN WHAT I'M GOING TO DO NOW THAT WE HAVE THIS DECEMBER 9TH ORDER - AND I WILL WRITE THIS DOWN LATER. I AM GOING TO TRACK.

AND IF YOU WOULDN'T MIND TAKING THESE NOTES FOR MS. JONES. YOU ARE TO FILE AN ADDITIONAL MEMO, IF YOU AND SHE CHOOSE,

WITHIN THREE WEEKS FROM TODAY, WHICH WOULD BE WHAT? NOVEMBER 8TH. IF YOU – AND WHAT YOU NEED TO DO, MR. KANTH, IS IF YOU HAVE EVIDENCE, ANY OTHER EVIDENCE OTHER THAN WHAT YOU'VE ALREADY FILED, SUCH AS AFFIDAVITS, YOU ATTACH IT TO THAT MEMORANDA, BECAUSE I WANT TO SHORTCUT THIS. IN OTHER WORDS, IF YOU'RE GOING TO HAVE A WITNESS, MAKE SURE THAT THAT WITNESS PUTS IN HER OR HIS DIRECT TESTIMONY THROUGH AN AFFIDAVIT BUT THEN IS HERE FOR CROSS-EXAMINATION.

THEN, MR. GREEN, TWO WEEKS FOR ANY OPPOSITION?

MR. GREEN: WE CAN COMPLY, YES, YOUR HONOR.

THE COURT: AND THAT WOULD BE WHAT THEN?

THE CLERK: NOVEMBER 22ND.

THE COURT: SO ON NOVEMBER 22ND ANY OPPOSITION. AGAIN, IF YOU FEEL, MR. GREEN, THAT YOU HAVE SUPPLEMENTAL AFFIDAVITS OR MATERIALS, IT MUST BE ATTACHED.

MR. GREEN: AND THE WITNESSES PRESENT, YOUR HONOR?

THE COURT: AND WITNESSES PRESENT. AND MR. KANTH, WHAT THAT MEANS IS THE WITNESSES WHO TESTIFY WILL ONLY TESTIFY IN CROSS-EXAMINATION TO BEGIN WITH AND THEN REDIRECT, BECAUSE I WILL HAVE READ WHAT THEY ARE TO SAY INITIALLY IN THE AFFIDAVIT FORM OR IN THE DEPOSITION FORM. THAT WAY WE CAN STREAMLINE THIS.

MR. KANTH: COULD I ASK A QUESTION?

THE COURT: SURE.

MR. KANTH: GIVEN THAT THE WITNESSES AND

THE NATURE OF THIS CASE ARE IN AUSTRALIA, IS IT REALLY A REQUIREMENT FOR THEM TO COME HERE?

THE COURT: NO. I WILL EXCUSE YOUR WITNESS, BUT I WANT YOU TO KNOW - THOSE THAT ARE IN AUSTRALIA. BUT I WANT YOU TO KNOW THAT THAT - THAT DOESN'T HELP YOUR CASE, BECAUSE THERE WILL BE QUESTIONS THAT WILL BE LEFT UNANSWERED. AND I REALIZE YOU'VE GOT THIS PROBLEM SO, YOU KNOW, YOUR AUSTRALIAN WITNESSES, ETCETERA, CERTAINLY DON'T BRING THEM HERE. THAT'S TOO EXPENSIVE. BUT IF THERE ARE QUESTIONS THAT ARE LEFT UNANSWERED. AND I DON'T KNOW HOW I'LL RULE ON THEM. THAT'S JUST A PRACTICAL PROBLEM.

MR. KANTH: MAY I RESEARCH SOME OF THIS TO SEE HOW FAR- THE HAGUE CONVENTION HAS TRIED MANY SUCH CASES. I'M SURE IN ALL SUCH CASE THE

PROBLEM ARISES OF ONE PARENT BEING IN A DIFFERENT COUNTRY.

THE COURT: ABSOLUTELY.

MR. KANTH: HOW WILL WITNESS PROCEDURES BE HANDLED.

THE COURT: ABSOLUTELY. YOU LOOK INTO THAT BUT BEAR IN MIND THAT AS A TRAIL COURT, I HAVE TO HAVE BELIEVABLE EVIDENCE, SOMETHING THAT I CAN EVALUATE, AND THAT'S GOT TO BE ONE OF THE CONSIDERATIONS. IN OTHER WORDS, TO BASE A DECISION ON FACTS, I'VE GOT TO HAVE A BASIS OF THE FACTS. I NEED TO SEE SOMETHING IN FRONT OF ME. AND IF THINGS – EVIDENCE IS TOO CONCLUSORY OR LEAVES HOLES, THEN THOSE HOLES REMAIN IS WHAT I'M SAYING.

MR. KANTH: SO AFFIDAVITS WILL NOT BE SUFFICIENT FOR THE PURPOSES OF THIS?

THE COURT: NO, I'M NOT SAYING THAT. WHAT I'M SAYING IS WHEN YOU HAVE WITNESSES WHO ARE OUT OF THE COUNTRY, AFFIDAVITS WILL HAVE TO BE SUFFICIENT, OKAY? BUT BEAR IN MIND THAT EVEN WITH THE BEST DRAFTED AFFIDAVIT, THERE WILL ALWAYS BE QUESTIONS. AND FOR THOSE OF YOUR WITNESSES WHO ARE LOCAL, WHO ARE HERE, YOU MUST HAVE THEM HERE FOR CROSS-EXAMINATION, BUT I RECOGNIZE OUT OF COUNTRY WITNESSES AND GOING TO BE ONLY BY AFFIDAVIT. OKAY?

MR. KANTH: THANK YOU.

THE COURT: ALL RIGHT. THEN-

MR. GREEN: ONE LAST ITEM, YOUR HONOR. IF MR. KANTH IS NOT GOING TO BE REPRESENTED BY MS. JONES, COULD WE BE NOTIFIED WITHIN SAY TEN DAYS?

THE COURT: YES, AND LET ME KNOW TOO. IF SHE'S GOING TO REPRESENT YOU IN THIS PROCEEDING, MR. KANTH, SHE HAS TO FILE THIS– IS SHE GOING TO BE BACK THIS WEEK?

MR. KANTH: APPARENTLY.

THE COURT: HAVE HER FILE A NOTICE OF APPEARANCE HERE SO THAT WE SEND THE PLEADINGS TO HER. SHE NEED TO BE ON OUR RECORDS. AND THEN AT THE SAME TIME NOTIFY MR. GREEN OF – IF SHE'S REPRESENTING YOU, SOMEONE ELSE, OR IF YOU YOURSELF.

MR. KANTH: I'LL LET THEM BOTH KNOW.

THE COURT: BECAUSE WE NEED TO KNOW WHO IS REPRESENTING WHOM.

ANYTHING ELSE?

MR. KANTH, HOW DO WE GET HOLD OF YOU IN CASE THERE ARE CHANGES AND THINGS? DO YOU

HAVE A LOCAL NUMBER?

MR. KANTH: I LEFT A PHONE NUMBER –

LOCALLY?

THE COURT: YES.

MR. KANTH: I'M AFRAID I'M GOING TO HAVE TO HEAD BACK, BUT I HAVE A PHONE NUMBER THAT I PASSED ON TO THE CLERK.

THE CLERK: I HAVE HIS NEW YORK NUMBER.

THE COURT: AND THEN IT WOULD BE GOOD IF YOU HAD MS. JONES OR OTHER LOCAL COUNSEL REPRESENTING YOU SO THAT WE HAVE SOMEONE THAT WE CAN GET IN TOUCH WITH QUICKLY.

MR. KANTH: IN FACT MS. JONES IS AVAILABLE.

MR. GREEN: THANK YOU, YOUR HONOR.

THE COURT: BUT SHE'S GOING TO – IF SHE IS; UNTIL THAT TIME, WE'RE GOING TO HAVE TO DIRECT CORRESPONDENCE TO NEW YORK.

MR. GREEN: IF MR. KANTH IS CONFIDENT THAT SHE'LL BE REPRESENTING HIM, I'LL AT LEAST COPY HER INTO THIS ORDER PERHAPS TO SAVE SOME TIME.

THE COURT: THAT'S RIGHT. I WILL – WHAT THAT MEANS, MR. KANTH, IS THE ORDER THAT I AM GOING TO PREPARE WILL GO TO MR. GREEN AND TO YOU. IT CAN'T GO FROM US TO MS. JONES BECAUSE SHE'S NOT YOUR ATTORNEY YET. MR. GREEN HAS OFFERED TO SEND IT.

MR. KANTH: I MUST TELL THE COURT I'M FAIRLY CONFIDENT SHE WILL BE. BUT I DON'T HAVE HER CONSENT YET.

THE COURT: MAKE SURE THEN THAT SHE ENTERS HER APPEARANCE.

(HEARING CONCLUDED AT 1:40 P.M.)

***

CERTIFICATE OF REPORTER

I, RAYMOND P. FELTON, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH DO HEREBY CERTIFY THAT I REPORTED, IN MY OFFICIAL CAPACITY, THE PROCEEDINGS HAD UPON THE HEARING IN THE CASE OF KANTH VS. KANTH, CIVIL NO. 2:99-CV-532C, IN SAID COURT, ON THE 18TH DAY OF OCTOBER, 1999.

I FURTHER CERTIFY THAT THE FOREGOING PAGES CONSTITUTE THE OFFICIAL TRANSCRIPT OF SAID PROCEEDINGS AS TAKEN FROM MY SHORT HAND NOTES.

IN WITNESS WHEREOF, I HAVE HERETO SUBSCRIBE MY NAME THIS 21ST DAY OF OCTOBER, 1999.

APPENDIX 'H'

Petitioner's Australian Hague Convention Child Abduction Application and Affidavit

FORM I

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations

APPLICATION IN ACCORDANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION FOR THE, RETURN OF A CHILD ABDUCTED FROM AUSTRALIA

REQUESTING CENTRAL AUTHORITY OR APPLICANT: The Secretary, Commonwealth Attorney General's Department	**REQUESTING AUTHORITY: NSW Department of Community Services, 164 Liverpool Road, Ashfield NSW, Australia**

Concerns the following children: Malini Amstel Kanth and Anjana Kesari Kanth

who will attain the ages of 16 on: 1 April 2009 and 20 February 2012

1. IDENTITY OF THE CHILD AND THE PARENTS ;

1.1 CHILD

Name and first names: Malini Amstel KANTH

Date of birth: 1 April 1993 .

Place of birth:	Salt Lake City. Utah, United States of America
Habitual residence:.	New South Wales, Australia
Passport No. or Identity Card No.	US Passport No. 0542 9912
Description and photo if possible:	Photo annexed

1.2 CHILD

Name and first names:	Anjana Kesari KANTH
Date of birth:	20 February 1996
Place of birth: States of America	Salt Lake City, Utah, United
Habitual residence: Australia	New South Wales,
Passport No. or Identity Card No.	US Passport No. 05452 9913
Description and photo if possible:	Photo annexed

2. PARENTS

2.1 Mother

Name and first names:	Cory Leigh KANTH

Date of birth:	8 September 1965
Place of birth:	Salt Lake City, Utah, United States of America
Nationality:	American Citizen
Occupation:	Homemaker
Habitual residence:	New South Wales, Australia
Passport No. or Identity Card No.:	US Passport No. 154507481

2.2 Father

Name and first names:	Rajani Kannepalli KANTH
Date of birth:	8 February 1949
Place of birth:	Madras, India
Nationality:	American Citizen
Occupation:	Professor
Habitual residence:	New South Wales, Australia

	Passport No. or Identity Card No., if any:	US Passport No: 054335271
2.3	Date and place of marriage:	Salt Lake City, Utah, United States of America in March 1992.

II REQUESTING INDIVIDUAL OR INSTITUTION:

3.	Name and first names:	Rajani Kannepalli KANTH
	Nationality of individual applicant:	American Citizen
	Occupation of individual applicant:	Professor
	Habitual residence:	32 High Street. Randwick, 2031, New South Wales, Australia
	Passport No. or Identity Card No, if any:	US Passport No. 054335271
	Relationship to the children:	Father
	Name and address of legal adviser, if any:	Not applicable

III PLACE WHERE THE CHILDREN ARE THOUGHT TO BE:

4.1 Information concerning the person alleged to have removed or retained the child.

Name and first names:	Cory Leigh KANTH
Date of birth:	8 September 1965
Nationality:	American Citizen .
Occupation:	Homemaker
Last known address:	2736 East 7305 South Salt Lake City, Utah, 84121, United States of America Tel: 801 733 9775
Passport No. or Identity Card No., if any:	US Passport No. 154507481
Description and photo:	Photo annexed

4.2 Address of children: 2736 East 7305 South Salt Lake City, Utah 84121, United States of America

4.3 Other persons who might be able to supply additional information relating to the whereabouts of the children:

Maternal Grandparents:	Marvin and Judy Meyer, 2736 East 7305 South Salt

Lake City, Utah, 84121,
United States of America

IV. TIME, PLACE, DATE AND CIRCUMSTANCES OF THE WRONGFUL RETENTION

The applicant father and the respondent mother were married in March 1992 in Salt Lake City, Utah, United States of America. On I April 1993 the child, Malini Amstel Kanth was born in Salt Lake City, Utah and the child, Anjana Kesari Kanth was born on 20 February 1996 in Salt Lake City, Utah.

Later in 1996 the father accepted an appointment as an academic in Denmark and the mother and children accompanied him to live in that country from 1996 to 1997. In June 1997 the father accepted an appointment as an academic at the University of New South Wales and the family traveled to Australia so that he could take up that position. It was the parents' intention to reside in Australia permanently.

The father later in 1997 transferred to the University of Technology Sydney where he is currently employed on a three year renewable contract which will expire in 2001. Between April and June 1999 the father and mother and the children returned to Salt Lake City, Utah for a holiday. The whole family carme back to Australia in June *1998 with* the intention of residing here permanently.

On 25 March 1999 the father returned home from work to find the mother and the children and their belongings missing. The mother had left a note stating that she loved the father and that she and the children would be living in their home in Utah. The father had no prior knowledge of his wifc's intention to leave Australia with the children and he did not consent to this and

has not since consented to their remaining in the United States of America.

The father believes that the mother and the children flew back to Salt Lake City. Utah on 25 March 1999. He has since had contact with the mother and knows that she and the children arc living with the matemal grandparents, Marvin and Judy Meyer at 2736 East 7305 South Salt Lake City, Utah.

V. FACTUAL OR LEGAL GROUNDS JUSTIFYING THE REQUEST

(1) The parties and the children were habitually resident in Australia at the time of the wrongful removal.

(2) The children have permission to reside in Australia as temporary residents until I July 2001

(3) There are currently no Court orders concerning custody of the children. In the absence of any such order, Sections 61B and 61C of the Family Law Act 1975 (a Federal Act) state that the applicant and the respondent have joint rights of custody over the children.

(4) The Applicant has had no contact with the respondent since a telephone conversation on 13 May 1999 or the children since a telephone conversation on 12 May 1999.

(5) The Applicant has at no time consented or subsequently acquiesced to the removal of the children to the United States of America or their retention there.

VII CHILDREN TO BE RETURNED TO:

(a) Name: Rajani Kannepalli KANTH
Date of Birth:

8 February 1949:

Place of Birth: Madras, India

Address: 32 High Street. Randwick
2031, New South Wales,
Australia

Telephone Number: 02 9399 3785 (Home)
02 9514 7734 (Work)

(b) PROPOSED ARRANGEMENTS FOR THE RETURN OF THE CHILDREN:

The applicant father would seek that the mother meet all requisite costs but failing this, he would be prepared to meet the costs himself.

VIII OTHER REMARKS

Nil

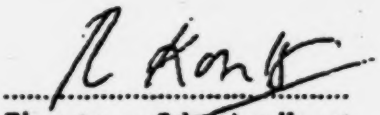
IX LIST OF DOCUMENTS ATTACHED

Annexure "A" - photograph of the children and the respondent
Annexure "B" - copy of birth certificate of Malini Amstel Kanth
Annexure "C" - copy of birth certificate of Anjana Kesari Kanth

I authorize the requested Central Authority and its agents to act on my behalf and to do all things reasonable and necessary in connection with this application.

DATED: 14 day of May 1999.

PLACE: Ashfield, New South Wales, Australia



Signature of the Applicant

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations.

Affidavit in Support of Application for the Return of a Child in Accordance with the Convention on the Civil Aspects of International Child Abduction

AFFIDAVIT

I, DOREEN EDITH MUIRHEAD of 164 Liverpool Road, Ashfield in the Slate of New South Wales, Solicitor, affirm as follows:

1. I am a solicitor of the Supreme Court of New South Wales.

2. I am employed by the New South Wales Department of Community Services which is the Central Authority. for the State of New South Wales pursuant to the Hague Convention on the, Civil Aspects of International Child Abduction (the Convention).

3. I have knowledge of the application made by Rajani Kannepalli Kanth pursuant to the Convention seeking the return of his children, Malini Amstel Kanth born I April 1993 and Anjana Kesari Kanth born-20 February 1996 to Australia.

4. I have been informed by Rajani Kannepalli Kanth that there are no orders made by the Family Court of Australia or under the Family Law Act 1975 in respect of his children, Malini Amstel Kanth and Anjana Kesari Kanth, relating to matters of residence or contact (formerly custody and access).

5. Section 61 B of the Family Law Act 1975 as amended (hereafter "the Act") states:

"In this Part, "parental responsibility" in relation to a child, means all the duties, powers. responsibilities and authority which. by law, parents havc in relation to children."

6. Section 61 C of the Act states:

(1) Each of the parents of a child. who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re- marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section)."

7. It is submitted that Rajani Kannepalli Kanth has "rights of custody" pursuant to Article 3 of the Convention and was exercising those rights at the time Immediatly prior to the wrongful removal of the children to the United States of America.

AFFIRMED at Ashfield in the State of New South Wales on 14 May, 1999 before me:

D. Muirhead
Doreen Edith Muirhead

Solicitor of the Supreme Court of New South Wales.

APPENDIX 'I'

Articles of the Hague Convention on International Child Abduction

HAGUE CONFERENCE

ON PRIVATE INTERNATIONAL LAW

FOURTEENTH SESSION

FINAL ACT

(Excerpts containing the text of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the recommended form for the Request for Return)

Final Act of the Fourteenth Session

The undersigned, Delegates of the Governments of Argentina Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela, and the Representatives of the Government of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer, convened at the Hague on the 6th October 1980, at the invitation of the Government of the Netherlands, in the Fourteenth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments---

A. The following draft Conventions---

I.

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish

procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions--

CHAPTER I--SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are--

(a) to secure the prompt return of children wrongfully removed to or retained in any contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where--

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the

law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention---

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II--CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other object's of this convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures

(a) to discover the whereabouts of a child who has been wrongfully removed or retained;

(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

(d) to exchange, where desirable, information relating to the

social background of the child;

(e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

(f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel. and advisers;

(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III--RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain--

(a) information concerning the identity of the applicant, of the

child and of the person alleged to have removed or retained the child;

(b) where available, the date of birth of the child;

(c) the grounds on which the applicant's claim for return of the child is based;

(d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be. The application may be accompanied or supplemented by -

(e) an authenticated copy of any relevant decision or agreement;

(f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

(g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take

or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that--

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV--RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or, securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V--GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise or rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this

Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units--

(a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

(b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this convention applies.

Article 36

Nothing in this convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention

which may imply such a restriction.

CHAPTER VI--FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time Of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the ministry of Foreign Affairs of the Kingdom of the Netherlands; this ministry shall forward. through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting state has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the tine of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force--

1. for each State ratifying, accepting, approving or acceding to it

subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2. for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it. If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial 'units to which the Convention applies. I The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following--

1. the signatures and ratifications, acceptances and approvals

referred to in Article 37;

2. the accessions referred to in Article 38;

3. the date on which the Convention enters into force in accordance with Article 43;

4. the extensions referred to in Article 39;

5. the declarations referred to in Articles 38 and 40;

6. the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7. the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October 1980 in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.